

November 3, 2021

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LEE-ANNE WALTERS, et al

Plaintiffs,

-v-

Case No. 17-10164

CITY OF FLINT, et al

Defendants.

/

MOTION HEARING

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

NOVEMBER 3, 2021

APPEARANCES:

For the Corey M. Stern
Plaintiffs: Levy Konigsberg, LLP
605 Third Avenue, Suite 33rd Floor
New York, New York 10158

Renner Kincaid Walker
Levy Konigsberg, LLP
800 Third Avenue, 11th Floor
New York, New York 10022

Madeleine Layla Skaller
Levy Konigsberg, LLP
605 Third Avenue, Suite 33rd Floor
New York, New York 10158

(Appearances Continued On Next Page)

**To Obtain a
Certified
Transcript
Contact:**

**Jeseca C. Eddington, RDR, RMR, CRR, FCRR
Federal Official Court Reporter
United States District Court
200 East Liberty Street
Ann Arbor, Michigan 48104**

November 3, 2021

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1 Moshe Maimon
2 Levy Konigsberg, LLP
3 605 Third Avenue, 33rd Floor
4 New York, New York 10158

5 For the Defendant James M. Campbell
6 Veolia: Campbell Conroy & O'Neil, P.C.
7 1 Constitution Wharf, Suite 310
8 Boston, Massachusetts 02129

9 Mark R. Ter Molen
10 Mayer Brown LLP
11 71 South Wacker Drive
12 Chicago, Illinois 60606

13 Andreas Ringstad
14 Campbell Conroy & O'Neil, P.C.
15 1205 Westlakes Drive, Suite 330
16 Berwyn, Pennsylvania 19312

17 Kristin Michele Dupre
18 Campbell Conroy & O'Neil, P.C.
19 1 Constitution Wharf, Suite 310
20 Boston, Massachusetts 02129

21 For the Defendant Wayne Brian Mason
22 LAN: Faegre Drinker Biddle & Reath LLP
23 1717 Main Street, Suite 5400
24 Dallas, Texas 75201

25 David C. Kent
Faegre Drinker Biddle Reath LLP
1717 Main Street, Suite 5400
Dallas, Texas 75201

To Obtain a Certified Transcript Contact:
Jeseca C. Eddington, RDR, RMR, CRR, FCRR
Federal Official Court Reporter
United States District Court
200 East Liberty Street - Ann Arbor, Michigan 48104

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P R O C E E D I N G S

THE CLERK: Calling the Flint Water Cases.

THE COURT: Thank you. Please be seated.

And it's going to take me just a minute to get my computer hooked up.

Okay. I'd like to suggest something today. I found it very difficult to spend the time that I was talking yesterday with the mask on. It caused a real challenge to me, and I notice that it did to all of you as well -- or some of you.

And so I'd like to offer you the opportunity when you're speaking only to remove your mask if you wish to. And if anybody has any concern about that, please let me know.

There's an absolute veto if any of you have a concern about it.

MR. CAMPBELL: Your Honor, I would like to take that opportunity. But if anyone in the courtroom has an issue with me doing that, I'm happy to keep the mask on as well.

THE COURT: Okay. Anyone else want to speak on that?

Okay. Well, then I think that's what we'll do when individuals are speaking. You're not required to take the mask off. But you may take it off during the time period that you're speaking.

For those who are not here in person, we do have Plexiglas surrounding everyone, and it's a pretty big room,

1 and there is room for social distancing as well.

2 Okay. So we are ready to get started with VNA and
3 LAN's motions to exclude Dr. Krishnan.

4 MR. CAMPBELL: Thank you, Your Honor. Good morning.
5 I'll be handling this motion, so I'll remove my mask.

6 THE COURT: Okay. Thank you.

7 MR. CAMPBELL: First of all, Dr. Krishnan, just to
8 focus us and to follow on some of the comments you had
9 yesterday about experts and really any witness, but these
10 particular experts fitting a role.

11 And Dr. Krishnan's role is to diagnose these four
12 bellwether plaintiffs with particular conditions in her
13 opinion. And I raise it because Dr. Krishnan does not offer
14 causation opinions and the like, and we're not going to
15 address those, because they were with -- Dr. Krishnan offering
16 those opinions was withdrawn formally. And in our briefing,
17 we make reference to that.

18 And significantly, I think she does not offer a
19 differential diagnosis on causation issues regarding these
20 four conditions. She has diagnosed the four children with
21 them, but there's no differential diagnosis.

22 And with that, Your Honor, I'd like to start with
23 Your Honor's questions. You had three of them for the
24 parties.

25 THE COURT: Yes.

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1 MR. CAMPBELL: I'll start with the first one. And
2 essentially the question is whether an expert like
3 Dr. Krishnan can offer opinions based upon clinical
4 experience, not anecdotal data or stories, but clinical
5 experience.

6 And the four cases do establish that, that if an
7 expert has extensive relevant experience in their -- his or
8 her clinical experience, that is a basis of or can be a basis
9 for expert opinion.

10 I think that the issue for us on that really relates
11 to Dr. Krishnan's predictions. And it melds I think all three
12 of your questions but particularly the last one. Whether
13 Dr. Krishnan or any expert can offer a prediction of the
14 future.

15 And the answer to that is it needs to be based upon
16 extensive relevant experience. And I think the record is
17 clear as to what -- how Dr. Krishnan offers her opinions
18 regarding percentage chances of these four bellwethers to
19 graduate from high school or to be in need of an
20 individualized education plan or even a percentage chances of
21 dropping out of graduate school.

22 And her statements are -- they are what they are and
23 they're for the parties and the Court to consider. For
24 instance, she describes those -- well, before I get to that, I
25 don't believe there's any dispute that there's no data,

1 there's no studies, there's no literature that Dr. Krishnan
2 draws upon to make these future estimations. What we're
3 dealing --

4 THE COURT: In one instance with respect to ADHD, she
5 cites a study that people with ADHD have a 15 percent chance
6 of high school dropout instead of a 5 percent chance, which is
7 apparently the standard.

8 MR. CAMPBELL: So, Your Honor, you predicted my next
9 statement --

10 THE COURT: Oh, okay.

11 MR. CAMPBELL: -- with one exception. That's the
12 Hendrickson study (phonetic). And the study doesn't support
13 Dr. Krishnan's opinion for this reason. She diagnosed, and I
14 believe I can use names of the plaintiffs based upon our --

15 THE COURT: Yes.

16 MR. CAMPBELL: She diagnosed the Sherrod plaintiff
17 with mild ADHD, and there's no dispute. That's what she
18 diagnosed the child with, mild ADHD. The Hendrickson study
19 found an association between, I believe the phrase is high
20 load ADHD. And there is none, no support for mild ADHD in
21 that paper.

22 So they're two different things, and that's, again, a
23 reason for our challenge to Dr. Krishnan's statements about
24 the future here.

25 Beyond the ADHD, the other diagnosis for three of the

1 plaintiffs are ultimately became a combination of a
2 neurocognitive and neurodevelopmental condition, mild
3 neurocognitive and developmental mixed diagnosis and a mood
4 disorder and the mild ADHD.

5 Those are the things she diagnosed the four children
6 with. And in connection with her efforts to predict the
7 future, she described them in different ways, all basically
8 giving us the same picture. Quote, "broad range
9 approximation." Quote, "approximate representation of the
10 number." She called it "anecdotal data" on one occasion. She
11 added, quote, "very rough approximation and then estimations."

12 That's how she describes this prediction as to the
13 future. And it just -- in the context --

14 THE COURT: Which goes to the strength of her
15 testimony but not to whether she used the scientific method to
16 arrive at that conclusion. And that's what Daubert requires
17 of an expert.

18 MR. CAMPBELL: Absolutely, Your Honor. But we
19 disagree with your characterization, the characterization that
20 you just made. In the absence of the supporting data, we're
21 talking about her practice or her experience, and she doesn't
22 have it.

23 She said quite clearly she doesn't follow the
24 children or her patients from childhood through, and she just
25 doesn't have that experience. So she doesn't have the

1 extensive, relevant experience called for by the cases.

2 Beyond that, Your Honor, in this population, whatever
3 it is that she's talking about, her own experience, there's
4 no --

5 THE COURT: I think she said that she doesn't -- in
6 her practice, she doesn't collect information on the patient
7 success in school ultimately. But she treats children at a
8 variety of ages and for a lengthy period of time in her
9 career.

10 So you're suggesting even with that experience,
11 that's inadequate to use her experience to make predictions.

12 MR. CAMPBELL: For this one, absolutely, Your Honor.
13 We do not know and the plaintiff hasn't offered and
14 Dr. Krishnan hasn't offered. You know, this is a percentage,
15 therefore, it's a ratio. So what is the denominator of that
16 ratio? What is the numerator of that ratio? But most
17 importantly, what is the collection of data that she's talking
18 about to arrive at this?

19 And specifically using ADHD or a mood disorder or
20 reasons why children don't graduate from high school, don't
21 succeed in college or drop out, common sense tells us that the
22 reasons for those things happening are myriad. They could be
23 literally anything.

24 And to take Dr. Krishnan's, you know, rough -- use
25 one of her words. "Rough approximations" or "broad

1 approximations," where is it coming from and where is the
2 analysis of the, let's call them, confounding factors?

3 You know, I think it would be a fair statement, Your
4 Honor, to just say somebody that has mild ADHD and doesn't
5 succeed in college, that's not a fair data point to say,
6 "Well, you know, there's a 25 to 50 percent chance there,"
7 because of the confounding factors.

8 If this was a study, a published study, those are the
9 things that peer review would go after. How do you -- how do
10 you do this?

11 THE COURT: Yeah. And that's a question I'll have
12 for plaintiffs to understand better what their perspective is
13 on how Dr. Krishnan made these predictions.

14 MR. CAMPBELL: So in our view, Your Honor, as we've
15 put forth in the brief and the support we have them, this is
16 -- it doesn't rise to the level of Daubert -- or Rule 702
17 interpreted by Daubert and Kumho and the rest of the cases.

18 It doesn't rise to that level of methodology. It
19 can't be discovered. It can't be tested by us. It is simply
20 her rough approximations or her anecdotal information about
21 this that is undefined otherwise.

22 THE COURT: But let me ask if you would distinguish
23 between her findings in her report of ADHD, mild
24 neurocognitive disorder and mood disorder? Those are
25 certainly testable. Those -- you disagree. You have your own

1 expert, and that's what a trial is all about. So that's one
2 thing that she concludes.

3 And from my perspective, I didn't see in your
4 briefing or hear in your argument yet today anything that
5 would say that shouldn't go to the jury.

6 MR. CAMPBELL: So, Your Honor, we're switching to the
7 second point I wanted to make, but I anticipated that it would
8 come together.

9 THE COURT: Okay.

10 MR. CAMPBELL: So here's the issue there. We
11 briefed, and there's extensive discussion in the briefing
12 about Dr. Krishnan's diagnosis using the DSM, which is the
13 gold standard for these types of diagnoses.

14 And that was Dr. Krishnan's choice to use the DSM and
15 to -- just to state what it is, it's a diagnostic manual that
16 identifies certain conditions. And the hallmark of the DSM is
17 the identification of diagnostic criteria. Dr. Krishnan did
18 not --

19 THE COURT: But the DSM itself lists a variety of
20 criteria that could lead to a diagnosis. But it is not, as
21 the cases say, a cookbook. You don't have to have one of each
22 ingredient to reach this diagnosis. And it's not the only way
23 to make a diagnosis.

24 MR. CAMPBELL: Well, to tag these -- to say that I
25 use the DSM to make these diagnosis and to put the -- you

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1 know, the strength of the DSM manual as the gold standard in
2 this field on these diagnosis without meeting the criteria of
3 these diagnoses is -- adds something to it that it isn't.

4 And, you know, I -- the plaintiff cited or plaintiffs
5 cited a number of cases. But I would distinguish those cases
6 on the cookbook issue, because there's some other way that
7 they are tied. Some objective standard with the one exception
8 of the New York case in a criminal setting.

9 But the others are distinguishable from what we're
10 dealing with here. So the way I would say it is this, Your
11 Honor: Dr. Krishnan, with her experience, clearly qualified
12 in this field, she could make a diagnosis of what the children
13 have. However, she chose to bolster that by hanging the tag
14 of a DSM diagnosis on it, and those don't fit.

15 I was trying to think of an analogy here. And the
16 best I can do -- and forgive me to Mr. Stern, but yesterday he
17 made reference to Rule 4. He knows that you need to serve a
18 complaint after you file it.

19 And I guess the analogy that I would say is someone
20 might say, "Well, I followed the Rule 4 criteria for service.
21 I served it." But if you don't do the criteria, it's not
22 Rule 4 service.

23 And the same thing pertains here. Demonstrably, it
24 is shown as set forth in our briefing that the criteria wasn't
25 met, and we have Dr. Krishnan bolstering this by saying it's a

1 DSM diagnosis when it isn't.

2 If I can return just for a moment to the future
3 issues. Dr. Krishnan does not give us any baseline, if you
4 will. In the absence of the Flint water issues or in the
5 absence of this or these diagnoses to stay focused on what
6 Dr. Krishnan did to diagnose conditions, what would be the
7 baseline for somebody -- for children in this circumstance?

8 We don't have that from Dr. Krishnan.

9 So then again to give the ratio, if you will, to a
10 percentage chance of what, you need the baseline to say that
11 there's some difference. You need the --

12 THE COURT: She does have a baseline. She seems to
13 think that 5 percent, I believe, of people don't graduate from
14 high school.

15 MR. CAMPBELL: I think she drew that -- Your Honor, I
16 don't mean to interrupt but --

17 THE COURT: Did she --

18 MR. CAMPBELL: I think that's drawn from the
19 Hendrickson paper, and that's not pervasive across the board,
20 and it certainly isn't relevant to the Flint children and what
21 the experience might be in Flint.

22 And that's relevant -- perhaps we'll take that up
23 with Dr. Crakes as well. But it's relevant because that's the
24 only data that we have for these children. So you have to
25 start from somewhere.

1 But to say these four children have these percentage
2 broad range approximations or however she describes it, you
3 need to say from what. And she doesn't do that.

4 THE COURT: What about her statements that
5 individuals with similar IQs are generally successful in two
6 to four year colleges? Would that be a baseline?

7 MR. CAMPBELL: I think it brings in other issues that
8 -- to restate what Dr. Krishnan found, these four children are
9 generally doing well in school. They are within the normal
10 range of IQ. There's no issues there. She doesn't raise any
11 issues there. They're doing well in school.

12 And to say that she identifies a percentage of how
13 children do or people do generally, I do believe you need to
14 tie it to Flint because of who you're dealing with.

15 THE COURT: What do you mean "who you're dealing
16 with"?

17 MR. CAMPBELL: I'm sorry. We are dealing with
18 children from Flint that are starting from that point --

19 THE COURT: But children in Flint are not inherently
20 different from children anywhere else such as Ann Arbor or
21 Boston.

22 MR. CAMPBELL: That is true, Your Honor. But when
23 you're talking about educational issues and predicting the
24 future, the starting point would be Ann Arbor or Boston or
25 Flint. And those -- that starting point is available. And it

1 would be a reasonable methodology to use for a starting point.

2 THE COURT: I'm not following you. You're suggesting
3 that a child -- let's take the Flint water crisis out of this
4 altogether. A child starts life in Flint. And are you
5 suggesting that that child starts behind the starting line
6 because they're in Flint?

7 MR. CAMPBELL: I'm not suggesting -- I'm saying that
8 there are -- there's data available from the government, the
9 census data that will describe what educational futures are on
10 a population-based analysis in any given community including
11 Flint.

12 THE COURT: And our job in the justice system is in
13 many ways to level the playing field, to look at each
14 individual as just that, an individual with strengths and
15 weaknesses. And to see, to ensure that they have
16 opportunities that every other child in this country has.

17 MR. CAMPBELL: I agree with that, Your Honor. And
18 that should be our view, but when we're dealing with issues
19 like this one, you know, what is the percentage chance of
20 somebody from a given area to do anything?

21 And that information is available. It's not casting
22 aspersions on anyone, and I certainly don't mean to do that,
23 and our briefing doesn't mean to do that. It is simply that
24 that data is available, and it is of the type of data that
25 experts who do this rely upon.

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1 THE COURT: Why does the area matter as opposed to
2 looking at the individual's home environment and their own
3 testing and their own personal situation? Why don't -- why
4 does the area they're from matter?

5 MR. CAMPBELL: Because it is the type of data relied
6 upon by people who do this. And the other factors that you
7 identify are certainly part of the mix as well.

8 You know, when I think that experts in the field,
9 when they consider what an educational future will be, among
10 the first places they will look is family history and how
11 parents, what that is.

12 And, you know, that's individualized, but that's what
13 these professionals do in order to approximate a future while
14 giving the same -- not saying anyone starts ahead or behind.
15 That is how this is analyzed by experts in the field. It's
16 not something that I'm overlaying on it.

17 If I could --

18 THE COURT: Okay.

19 MR. CAMPBELL: -- move for a second, Your Honor.
20 Just, the cases that we talked about yesterday or that came up
21 yesterday regarding -- excuse me -- Dr. Graziano. You know,
22 what do you need in Michigan in order to predict the future?
23 And I think most of those go to damages, if you will.

24 But this is a damage issue. And I think they're
25 instructive of what is required. And I would just to throw

1 out the case names Henry, the Court mentioned Larson, Stites
2 citing King. And even the Rupersberg case that was cited
3 yesterday by the plaintiffs, that -- it has to do with medical
4 bills but requires a reasonable certainty into the future.
5 That's the phrase for the medical bills.

6 In any case, the clear implication of these cases is
7 that whatever this is, it has to be reasonable certainty. And
8 I believe the Stites case, if I have my cite correct,
9 described that as, quote, "in all likelihood."

10 And that's not what we have here.

11 THE COURT: But here we have a diagnosis, and we have
12 Dr. Krishnan -- well, let me ask you if the cases you're
13 citing apply to someone who has a diagnosis of lead poisoning
14 and ADHD, mood disorder, etcetera, and what we're talking
15 about is the likelihood of that progressing?

16 MR. CAMPBELL: Right. Clearly and obviously they
17 don't apply. They're not about lead.

18 THE COURT: Right.

19 MR. CAMPBELL: But do they apply? Yes, they do. And
20 they apply, because they require a present injury. These
21 children on these issues do not have a present injury. At
22 best, what Dr. Krishnan is doing is trying to assess a risk
23 factor that may currently exist. It's not a present injury.

24 THE COURT: Well, what if the present injury is the
25 ADHD or mild neurocognitive disorder?

1 MR. CAMPBELL: So according to Dr. Krishnan, that's
2 exactly what the injury is. And that's what they have, and
3 that's what Dr. Krishnan would like to testify about. But
4 that doesn't mean that you can then say, "Well, in the future,
5 this is what's going to happen."

6 Michigan law is clear that future damages need to be
7 -- are not recoverable unless they are reasonably certain or
8 happen in all likelihood. And that's what we're talking about
9 here.

10 THE COURT: But that goes to how did she come up with
11 the 15 to 20 percent likelihood of not graduating from high
12 school as a result of these conditions. Which to me is
13 different from whether these known conditions that she
14 diagnoses them -- you know, the jury will decide.

15 If her evidence is weak, if her presentation is weak,
16 your expert is stronger, that the children don't have these
17 disorders, well, then it's not an issue.

18 But assuming she testifies that they have these
19 conditions, what are the cases that say that if she can
20 support with her experience or with her experience, I guess is
21 what it has to be, that her predictions are accurate.

22 What are your cases to say she can't do that?

23 Now, I don't know that her report shows where she
24 drew those numbers from. So that's a question the percentage
25 is from. So that's a question for plaintiffs.

1 MR. CAMPBELL: So we've talked about why we don't
2 think those percentages and that analysis meets the Daubert
3 standard. But beyond that -- and I would stand corrected.
4 But I believe that the report simply placed these percentages
5 without describing any more of a basis than what we've already
6 talked about.

7 THE COURT: I agree with that.

8 MR. CAMPBELL: And as to the case law, the best I can
9 do right here, Your Honor, subject to, you know, coming up
10 with a case that we could submit later is the ones we've cited
11 go to this issue.

12 And there is -- in fact, there's -- it's not probable
13 that these conditions -- that these results will pertain even
14 according to Dr. Krishnan since they're all below 50 percent.

15 That's -- it's not reasonably likely. It's not
16 reasonably probable. It's not more probable than not, because
17 the percentages are less than 50 percent.

18 So by her own analysis, it is not probable. It's not
19 reasonably certain. And it is a speculative analysis based
20 upon her experience that doesn't support it for the reasons
21 that I've already articulated.

22 THE COURT: Okay. Well, thank you.

23 MR. CAMPBELL: Thank you, Your Honor.

24 THE COURT: Who will be responding for plaintiffs?

25 MR. WALKER: I will, Your Honor.

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1 THE COURT: Okay.

2 MR. WALKER: Renner Walker for the plaintiffs.

3 And I'd like to also do my best to answer the Court's
4 questions that were provided in the communications to the
5 parties. For the most part, I think our brief covers outside
6 of the future damages issues, which I think were a lot of the
7 discussion.

8 And the question was directed, you know, just to say
9 briefly maybe ahead of the questions, or as I said, part and
10 parcel of the first point, you know, the DSM as cookbook. And
11 I think there's something that --

12 THE COURT: Well, why don't you start out -- what I'm
13 actually most concerned about is the basis for Dr. Krishnan's
14 estimates about the future, her predictions for the decreased
15 likelihood of high school graduation, for example.

16 Where does she get that?

17 MR. WALKER: She mentions it in her deposition, I
18 think. And what she says is this is clinical experience, that
19 she's treated a lot of children, and, no, she doesn't have a
20 database. She does not follow every child.

21 But they are, you know, based on her experience
22 working with children over the years, that these are the kinds
23 of consequences she has seen. She does call them -- she calls
24 it an approximation or an estimate.

25 And, in part, that is -- I think that follows in some

1 ways from the weakness of literature generally in this field.
2 I think the Fredriksen study is a benchmark. I think she
3 draws -- she draws on it and makes her own inferences about
4 it.

5 There's certainly a dispute. VNA disputes the
6 strength of the study in supporting her conclusions. But I
7 think that's a better question for cross-examination.

8 THE COURT: Does she treat any adults or in college
9 or anyone in masters programs? Because she draws on these
10 percentages saying you're only X percent likely -- these
11 bellwether plaintiffs are only X percent likely to graduate
12 from college with these conditions.

13 Does she treat people in college?

14 MR. WALKER: Yes, Your Honor. I think it's adults at
15 large discussed in her deposition. About 30 to 40 percent of
16 her patient base are adults. So she is seeing, obviously, the
17 majority, 60 to 70 percent are children. And of those, she
18 specifies that the bulk of them are kind of in the, I don't
19 know what you call that, the preadolescence 2 to 12 or 13 or
20 so. But about 30 to 40 percent are adults.

21 And so, you know, what -- she explained certainly to
22 me when I tried to get some more clarity on it, but I think
23 it's in the deposition, as well, is that literature, it may
24 lag behind. Current conditions, it may deal with children
25 that do have other confounding factors.

1 And to the point of localized conditions, that, if
2 anything, bolsters clinical judgment. Because Dr. Krishnan
3 has an office in Grand Rapids, treats children in Michigan.
4 She's familiar with conditions like schools. And, if
5 anything, that strengthens her ability to assess how children
6 are going to perform over time.

7 THE COURT: Does she rely on the Fredriksen study for
8 anyone other than Sherrod?

9 MR. WALKER: Yes, Your Honor. And let me -- I have
10 the report in front of me. It is also in the D.W. report.
11 Yeah. She mentions it with respect to D.W. as well. And I
12 think that, you know, she's trying to synthesize data as well
13 as she can, knowing that there are -- you know, and she is
14 doing batteries of tests with these children.

15 It's not -- you know it's not purely -- you know I
16 think she's with them for seven hours. She interviews them,
17 interviews the parents. So she certainly is trying to draw as
18 much data as possible.

19 I think the Fredriksen study is one data point that
20 she relies on. It provides one baseline, which is the, sort
21 of, the 5 percent number. And so she's able to say, "Well, if
22 it's a two to three times likelihood, that might be a 10 to 15
23 percent chance that they're going to not complete high
24 school."

25 THE COURT: Mr. Walker, you talked about the

1 literature maybe lagging behind in this particular area. Do
2 you have cases that would suggest that when the literature
3 lags behind, courts should not follow the literature and lag
4 behind as well?

5 MR. WALKER: I don't know of a case that speaks of,
6 say, you know, literature not -- of lagging. Not off of the
7 top of my head, in all candor, Your Honor. What --

8 THE COURT: And I'm not suggesting that anyone should
9 lag behind reality. And that maybe that's where experience of
10 an expert permits a particular finding to be admissible.

11 But I'd be interested if there simply are not studies
12 that can support these predictions, what is the basis for the
13 Court accepting that testimony?

14 MR. WALKER: So and I think it's an important point
15 that is mentioned, and I believe it is the Best case, if I'm
16 trying to do my best to remember -- sorry.

17 THE COURT: Best.

18 MR. WALKER: My best to remember the discussion in
19 that case. There's an argument that there's not a single
20 piece. I'm looking at page 181 of the opinion. You know, not
21 a single piece of medical literature that supports the
22 expert's opinion.

23 And, you know, what the court does say, I think the
24 court thinks it's not dispositive.

25 Sorry if that's me creating the rumble, Your Honor.

1 THE COURT: Right. And that's an interesting thing
2 where the Best versus Lowe's Home Center, Inc., case says that
3 an expert must, quote, "Employ in the courtroom the same level
4 of intellectual rigor that characterizes the practice of an
5 expert in the relevant field."

6 And so you're telling me that Dr. Krishnan exercised
7 professional techniques in these interviews, administration of
8 the testing, evaluation of the records to reach these
9 predictions. And what's left is for Mr. Campbell to
10 cross-examine her.

11 MR. WALKER: Yes, Your Honor. If I --

12 THE COURT: What if -- because from my reading of the
13 material, it appears that -- it is difficult for me to track
14 where she gets the specific percentages for each of the
15 bellwether plaintiffs. But she certainly says they have a
16 decreased, somewhat decreased chance.

17 Because she even has a range of -- like for R.V., she
18 says that that individual has mild neurocognitive disorder and
19 a 25 to 50 percent chance of needing tutoring. So that's --
20 and that's more immediate. She knows what the math scores
21 are. She knows what's going on there.

22 But in terms of these, "30 to 50 percent chance that
23 A.T. will not graduate from college," what if I permitted her
24 to say that the plaintiffs have a somewhat decreased
25 likelihood of graduating from high school and college as a

1 consequence of these diagnostic outcomes?

2 MR. WALKER: I think that would be -- and to be
3 honest, obviously, I don't believe to speak for Dr. Krishnan,
4 of course. I think that she would think that would be -- I
5 know that it doesn't have a number, but in some ways a more
6 accurate way to put it.

7 And I think to go back to what Joiner and what Best
8 talk about, right, it's ensuring that an expert employs the
9 same level of intellectual rigor in the courtroom that they
10 apply in their ordinary practice.

11 And so, you know, it's certainly a clinical
12 neuropsychologist is not always trying to come up with a
13 precise number. They're not gamblers. What they're trying to
14 do is establish risks and hopefully courses of treatment that
15 can help the child. Or obviously she treats adults too.

16 But so I think when the 25 to 50 percent number comes
17 along, I think she says this about A.T. in her likelihood of
18 success in college or perhaps lack thereof.

19 There are not specific numbers about college success
20 or lack thereof for children who have neurodevelopmental
21 disorder. And so she's basing it on experience. She's trying
22 to synthesize when she can, and I think the decreased chance
23 is accurate or maybe in some ways better than the number, to
24 be honest.

25 THE COURT: Let me ask you what do you think of

1 Mr. Campbell's use of the cases, the Michigan cases that there
2 has to be a reasonable certainty for damages to be collected,
3 reasonable certainty of the harm?

4 MR. WALKER: So I looked at cases as well, and I saw
5 Henry, and I saw Larson, although I think Larson is of course
6 -- Henry articulates very well there's like a distinction
7 between a present injury that might have future consequences
8 versus a present exposure without a present injury that might
9 result in a future injury.

10 I think that was asbestos in Larson.

11 THE COURT: It was.

12 MR. WALKER: So I looked at it, a case, and it was
13 informative. Of course, the injury itself is somewhat
14 different. But it was Berrios versus Miles, Inc. That's 226
15 Michigan Appeals 470. It was obviously a tragic story. A
16 young man, hemophiliac had contracted HIV.

17 And it presents as a statute of limitations case.
18 But, you know, the court has a, I think, very enlightening
19 discussion about damages on page -- is it bridges page 478 and
20 479 that, you know, damages may inherently have some
21 speculative component to it. But, you know, they just --
22 because they can't be ascertained with mathematical precision
23 doesn't include recovery.

24 And I think one of the things that, you know,
25 influences this on some level is that if it's a damages

1 question, you know, I think -- I suppose the alternative would
2 be that we would have to wait and see if any of these children
3 doesn't finish high school.

4 And so I think that being able to present that
5 information to the jury, I know that, you know, Dr. Krishnan
6 did not use the magic words "reasonable certainty." I think
7 that that's what she's trying to gesture at. I think
8 reasonable certainty is like any of those sort of probable
9 cause or whatever. I think it's difficult to say precisely
10 what it means.

11 But I think what the court is getting at is that, you
12 know, although you might not have a precise number or
13 whatever, that those are ordinarily jury questions.

14 THE COURT: So you're suggesting that these are
15 present injuries with future consequences that this expert can
16 describe for us as opposed to the Larson situation of is there
17 a likelihood of future injury? This is a present and known
18 injury according to her diagnosis that will have a future
19 consequence. And in her professional experience she knows
20 what that looks like.

21 Do psychologists, neuropsychologists make predictions
22 about -- is this the ordinary course of their professional
23 work to make a prediction about graduation rates?

24 MR. WALKER: You know, the answer that I was getting
25 at earlier, Your Honor, I think that they are less, you know,

1 making precise predictions trying to come up with a 25 or 50
2 percent, rather than, you know, trying to assess is that a
3 risk and it does the course of care.

4 THE COURT: And if we're looking at the future
5 predictions as a damages issue, is the fact that her
6 predictions are under 50 percent mean that they are -- that
7 there's not a reasonable certainty because it's not more
8 likely than not?

9 MR. WALKER: I don't think so, Your Honor. I mean, I
10 think, you know, if a person -- if a bricklayer falls off a
11 building and breaks their back, the damages expert is going to
12 have to come in and try to make a prediction as well. You
13 know, I think that's always -- there's going to be uncertainty
14 built into that.

15 THE COURT: But there you have a known injury, which
16 we have a known injury here of ADHD, etcetera. But the
17 bricklayer, we also know, we're going to have the vocational
18 expert testify about what she can do. Can she stand, stoop?
19 Believe me, I've heard a lot of vocational experts. How much
20 can she lift? How much can she twist, you know, all of those
21 things.

22 And then so it's -- so there is sort of very clear
23 certainty, or at least experts can battle it out, which is
24 what trials are for. One expert's going to say the person --
25 the injury's nothing at all. They can climb and lay more

1 bricks. And another is going to say they're virtually bed
2 ridden.

3 MR. WALKER: And I think that that will happen here.
4 I mean, certainly VNA makes an argument based on its expert's
5 report with respect to at least one of the children in its
6 motion to exclude Dr. Krishnan.

7 Certainly VNA makes -- and, you know, Mr. Campbell
8 made a point to say that there currently appear, you know,
9 some of them are within average ranges of IQ, that kind of
10 thing.

11 We think that that does not pick up on all of the
12 symptoms. You know, to say that one child is within average
13 IQ range may obscure the fact that the problem is that they're
14 lagging a grade behind or more in reading scores or something
15 along those lines.

16 What I would add, by the way, is not only is it a
17 capable battle of the experts here, but that Dr. Bithoney can
18 also speak to, you know, in his experience as well, treating
19 5,000 children.

20 One of the issues that's going to come up in his
21 motion is the lag effect. Right? That they perform well
22 maybe or better comparatively than when they are younger, and
23 that it over time, you know, when they get to be 15, 16, 17.
24 And he's seen those things as well.

25 So I think that he -- you know, Dr. Krishnan is not

1 the only expert that can speak to this.

2 THE COURT: Okay. The Berrios case is interesting,
3 because it tells us that in Michigan, although damages based
4 on speculation or conjecture are not recoverable, because they
5 cannot be ascertained with -- damages are not speculative
6 merely because they cannot be ascertained with mathematical
7 precision.

8 It is sufficient if a reasonable basis for
9 computation exists, although the result be only approximate.
10 But we have to square that with the remainder of the cases
11 that talk about a reasonable certainty that these negative
12 consequences will take place.

13 And in that case, as I'm seeing now, the individual
14 had an infection with HIV and did not yet have the onset of
15 symptoms. So the cause of action was when there was HIV and
16 not yet the symptoms. But it sure seems to me that the
17 scientists can give us a reasonable degree of certainty about
18 what that progression could be at that time, which was 1997,
19 prior to some of the treatments that are now available.

20 So okay. I'll take a closer look at Berrios.

21 Mr. -- oh, did you have anything further?

22 MR. WALKER: I was about to say unless the Court has
23 further questions for me.

24 THE COURT: Not at this time.

25 Yeah, Mr. Campbell.

1 MR. CAMPBELL: May I follow-up? Thank you, Your
2 Honor. I have not read the Berrios case. I'm not sure
3 whether I should have. I didn't recognize it as one that was
4 in the briefing.

5 THE COURT: I didn't either.

6 MR. CAMPBELL: But just listening to Your Honor as to
7 what it said, that seems to me to be relative black letter law
8 type of comments about, I don't know, maybe economic-type
9 damages where the challenge is not -- well, you don't know
10 exactly what it is. Of course not. It's presented based upon
11 a reasonable methodology, accepted in the field, and that's, I
12 believe, probably what the case is addressing.

13 But the bottom line is the -- every case in Michigan
14 that I've seen on this issue is quite clear that plaintiffs
15 may not recover for something they may suffer in the future
16 unless it's founded in reasonable certainty. We don't have
17 that here. Your Honor used the phrase that we have a "present
18 condition with future consequences."

19 Using the example that you had of somebody, you know,
20 I believe it was a bricklayer that has an injury on the job
21 that does something physically to himself or herself that
22 takes the person out of that occupation, that's a different
23 story than what we have here.

24 We have a situation here where there are no known
25 future consequences other than this prediction of a percentage

1 that's under 50 percent with children that are doing well with
2 normal IQ scores and based upon the challenged methodology
3 that Dr. Krishnan is using to get to those percentages.

4 I think it's a very, very different circumstance.
5 That's the position we have. And I would close, Your Honor,
6 with one of the cases you cited was Brown. And I had the
7 quote from the Brown case is on this issue of future
8 testimony.

9 Quote, "Experience without reliable, testable
10 methodology is insufficient." And that's -- I think,
11 describes what we're dealing with here with Dr. Krishnan.
12 She's referenced her patients. But, again, we don't know the
13 numerator, the denominator. We don't know the compounding
14 factors in a circumstance where so many things can affect
15 educational success.

16 THE COURT: Okay. Thank you.

17 All right. So I will take that -- all of your
18 remarks along with the briefing into consideration and issue a
19 written opinion.

20 We are now up to Dr. Bithoney. Want to say anything
21 on Dr. Krishnan, Mr. Mason?

22 MR. MASON: I apologize, Your Honor. I believe it's
23 been covered.

24 THE COURT: Okay. Thank you.

25 Let me start. Who's going to argue for plaintiff?

1 Yeah, I see you, Mr. Campbell.

2 Mr. Stern, let me just ask a couple of questions that
3 I think will help me focus on this.

4 Dr. Bithoney, let me ask you if you intend to illicit
5 testimony about the specific diagnoses that the plaintiffs
6 have or their symptoms. Because in his report, I saw a
7 connection between plaintiffs' symptoms and lead, but I didn't
8 see the diagnosis in lead.

9 MR. STERN: Thank you, Your Honor.

10 Dr. Bithoney relies upon the diagnoses of
11 Dr. Krishnan. And with 50 years of experience as not just
12 someone who specializes in lead poisoning but clinical
13 practice dealing with children, he is familiar with, based on
14 his practice and experience, those diagnoses, even though he,
15 himself did not formulate the diagnoses.

16 Meaning that Dr. Krishnan spent hours and performed a
17 battery of tests and did certain things to come to the
18 conclusions that she did, and Dr. Bithoney did not. So to --

19 THE COURT: Oh, I know that. I know that. I was
20 just interested in whether you were going to have him testify
21 about the various symptoms that your clients have experienced
22 as opposed to their diagnosis being caused by lead.

23 MR. STERN: He's going to talk about the symptoms
24 that they've experienced and his experience in dealing with
25 those symptoms and what those symptoms mean to him in terms of

1 his analysis as to whether, A, they're lead poisoned and then,
2 B, causation associated with the lead poisoning.

3 But his testimony is essentially all about the
4 symptoms. But to say that he wouldn't be able to speak on the
5 actual diagnoses, I think would be disingenuous of me to say
6 that to the Court.

7 I don't think he needs to. I think that he can take
8 -- make assumptions based on Dr. Krishnan's diagnoses, and
9 based on the symptoms reported to him both in medical records
10 from the parents potentially from teachers or schools, he can
11 then give his opinions based on the symptoms.

12 THE COURT: Right. And you're talking about specific
13 causation. And I think I was clear. I'm looking at his
14 testimony on general causation. And for example with mood
15 disorder, is he going to testify that mood disorder is caused
16 by lead poisoning?

17 MR. STERN: Yes.

18 THE COURT: Okay. Well, let me let Mr. Campbell
19 speak first, and then we'll go from there.

20 MR. CAMPBELL: Thank you, Your Honor.

21 I've debated where to start on this one.

22 THE COURT: There's a lot here. I debated where to
23 start.

24 MR. CAMPBELL: And if it's okay with Your Honor, I
25 know the one question that you asked of us was the one that

1 you just put to Mr. Stern. But, typically, I would start with
2 that, because obviously it's top of mind for you. But I'd
3 like to start at another point if that's okay.

4 THE COURT: That's just fine.

5 MR. CAMPBELL: So the point that I wrote down first
6 to start with is the one that was discussed just now. I took
7 the time when we started with Dr. Krishnan to say that she was
8 withdrawn as a causation expert, and there is no causation
9 source from her.

10 So one of the things that's fundamental under
11 Michigan law or Sixth Circuit law is that the plaintiffs'
12 burden here is to rule out or to do a differential diagnosis
13 to use a phrase that's better for the medical part of it as to
14 these conditions.

15 And I think again, common sense tells us as well as
16 the DSM and testimony that mood disorders, the alleged mix of
17 neurocognitive and newer developmental diagnosis by
18 Dr. Krishnan and certainly ADHD can have multiple, multiple
19 causes.

20 Now, the plaintiffs' proof here fails, because there
21 is no one that has been offered to do that differential
22 diagnosis.

23 THE COURT: Well, Dr. Bithoney took into
24 consideration a great deal of information. And in his
25 deposition, it becomes clear that he looked at things like

1 fetal alcohol. He looked at family history. His deposition
2 implies a differential diagnosis. His report does not
3 specifically provide that.

4 I agree with you that his report -- it is not clear
5 in the report what he did to rule out these other conditions.
6 He certainly has support for why he ruled in lead as the
7 course of the problem.

8 But it is difficult in the report itself, but it
9 seems to me that his deposition touches upon the differential
10 diagnosis.

11 MR. CAMPBELL: I'd have to disagree with you, first
12 of all, at least as to the deposition. On the report, there
13 is none. I read them, and for this point, I read them again.
14 And as far as I can tell, there's nothing in the report.

15 And the report defines the disclosure and what we're
16 dealing with. And that defines what you need to inquire about
17 at a deposition. In the deposition, Dr. Krishnan no doubt
18 talked about the things that you did, but it didn't apply it
19 to the four plaintiffs.

20 And I stand on the statement that there is no
21 differential diagnosis for these children with these
22 conditions that are clearly and obviously, and I would say
23 concededly, could be caused by other things other than
24 exposure to lead.

25 And that is a fundamental failure of the plaintiffs'

1 burden here with respect to Dr. Krishnan and -- well, I'll
2 leave it at Krishnan.

3 THE COURT: Well, he goes through the family history
4 for each individual plaintiff.

5 MR. CAMPBELL: He does that, but that's not a
6 different -- that does not address, to be specific, let's just
7 pick one. ADHD. ADHD can be caused by multiple things. And
8 among the criticisms that we raised for Dr. Krishnan is that
9 although he looked at a couple of blood lead studies, not bone
10 lead. We'll get to that.

11 For ADHD, you know, that arguably create a situation,
12 not a causal basis. But he ignored the major burden or major
13 body of literature that would not create that and addresses
14 other things.

15 So, yes, he did a family history, but that's not a
16 differential diagnosis. That's not stated anywhere that I
17 have considered these other potential areas for these
18 conditions --

19 THE COURT: With respect to ADHD, he asked the
20 parents whether they drank alcohol, or the mothers whether
21 they drank alcohol during their pregnancies. He asked whether
22 there was a family history of ADHD. And those are certainly
23 ways to rule -- to come up with a differential diagnosis.

24 MR. CAMPBELL: I have no doubt that it's a start ,
25 Your Honor. But I also have equally no doubt that that's not

1 the end point. You have to do more. And I would say that if
2 that was the key issue in this case or some other case, the
3 litigants would be in here arguing to you that that is an
4 insufficient basis of methodology to do the differential
5 diagnosis.

6 THE COURT: If we know, in fact, that he did it based
7 on some of his responses during his deposition but he didn't
8 know that it's a requirement for specific causation in
9 Michigan, and so it, therefore, was not spelled out in his
10 report for each of the bellwether plaintiffs, is there any
11 prejudice to the defendants for allowing him to simply say
12 what he did. He either did it or he didn't.

13 And he is somebody with -- you said 50. I thought it
14 was 40 years of experience in this area. And it's clear to me
15 that there's -- that he did -- he was looking for other
16 sources for these problems, but he never states it clearly in
17 his written report.

18 It comes out through the deposition but not in the
19 report, and he never summarizes it in a neat, tidy package for
20 us.

21 MR. CAMPBELL: So, Your Honor, what I would say to
22 that is first of all, I disagree for the reasons I already
23 said, that the deposition addresses it. Leaving that aside --

24 THE COURT: Okay.

25 MR. CAMPBELL: -- we are, you know, a few months to

1 trial. We are at a Rule 702 hearing. We have followed the
2 requirements of an extensive CMO. And this is the time for
3 the challenge to these experts.

4 And I don't know that Dr. Krishnan -- I'm sorry.
5 Dr. Bithoney would know or not know about what the
6 requirements are. But that's the role of the litigants. And
7 we are at a time now where this is the Rule 702 challenge to
8 what has been put forth and this is a fatal flaw in his
9 opinions.

10 And to then say, "Well, we're going to rescind the
11 CMO and, you know, the Daubert issues and Rule 702 and allow,
12 you know, further expert reports," that's going to lead to
13 further expert reports or responsive reports, further
14 depositions.

15 And what I would say, Your Honor, is, yes, we are
16 prejudiced, because we're here. And if the rules are now
17 changed as to where we're at, then that's the prejudice.

18 THE COURT: No. We are at the Daubert hearing.

19 In the deposition, he says that he looked at family,
20 medical, and social histories, medical records for the
21 plaintiffs, including lab results, maternal alcohol and drug
22 use, and genetic factors.

23 Is that accurate?

24 MR. CAMPBELL: Your Honor, without doing the
25 differential diagnoses, this is what I did, these are my

1 findings. We can read comments in his deposition testimony,
2 but it's not a differential diagnosis. It's not stated. It's
3 not -- it wasn't subject to disclosure in his report, and the
4 report defines the disclosure and the level of inquiry. It's
5 not there.

6 THE COURT: Okay. Yeah. It's certainly not in the
7 report.

8 So what is the response from plaintiffs just so we
9 don't lose some of these.

10 MR. STERN: Sure. Your Honor, there's no requirement
11 that a expert says magic words when it comes to a differential
12 diagnoses.

13 THE COURT: No. But under Michigan law, for a
14 specific causation expert, they have to have ruled out other
15 causes.

16 MR. STERN: There's not -- I don't know of a single
17 question that Dr. Bithoney didn't answer that would lead
18 anybody to believe that he did not come up with a differential
19 diagnosis.

20 He looked at literally every piece of family history.
21 He looked at every medical record that was available. He did
22 look at blood levels. Did look at bone levels. But
23 ultimately, there was nothing else for him to attribute the
24 causation to based on his differential diagnoses.

25 THE COURT: So show me in the report where he makes a

1 differential diagnosis. Let's take Sherrod.

2 MR. STERN: Hang on one second.

3 THE COURT: That's just who I have first.

4 MR. STERN: First and foremost, he says, "Emir was
5 born after an uncomplicated pregnancy, labor, and delivery."

6 One of the hallmarks of the type of neuro -- this is
7 not -- I'm now commenting on that sentence in his report, so
8 I'm not quoting the report.

9 THE COURT: Okay.

10 MR. STERN: But one of the things in cases like this
11 that a defendant might argue is an actual cause of the same
12 injuries that Emir Sherrod has here is that a child had a low
13 Apgar score at birth, or there were complications where a
14 child was stuck in utero during the birth and delivery and
15 there could have been brain damage.

16 So he's not mentioning this sentence simply because
17 it's commonplace. He's saying that Emir was born after an
18 uncomplicated pregnancy, labor, and delivery, meaning that
19 there's nothing from the labor and delivery that would have
20 caused any of these issues. That goes into a differential
21 diagnosis.

22 Mother did not ingest alcohol during her pregnancy.
23 Again, fetal alcohol syndrome could very much lead, and he
24 touches upon this in his deposition as well, could lead to the
25 same type of injuries that have been diagnosed by Dr. Krishnan

1 here.

2 However, before she knew she was pregnant, she ate
3 half of a marijuana cookie purchased legally every few days.
4 So he is now recognizing that there might be some connection
5 during a birth and delivery to illegality, whether it was
6 alcohol or drugs, but there's no testimony from anybody else,
7 and clearly he does not believe that the ingestion of a
8 marriage cookie every few days would have had any impact on a
9 different cause for the same diagnosis.

10 He talked about the birth weight. Again, children
11 with lower birth weights typically indicates premature birth,
12 and a premature birth may lead to complications that involve
13 brain issues and brain development.

14 But he's now recognizing that during the course of
15 labor, delivery, and even post-delivery that this is a normal
16 child.

17 If we skip down to --

18 THE COURT: Okay. So what you're telling me is that
19 the magic words "differential diagnosis" are not needed or the
20 magic words of I ruled out X, Y, and Z as the source of the
21 ADHD.

22 MR. STERN: Correct.

23 THE COURT: But, in fact, that's what's implied in
24 this report.

25 MR. STERN: Correct. I mean, the paragraph that

1 begins with, "Emir has no chronic -- Emir has no chronic
2 medical issues except for skin rashes, which seem to improve.
3 And extensive review of system within normal limits except as
4 described herein."

5 That's a ruling out of chronic issues. What if he
6 had chronic migraines or if he had chronic sleep disorder or
7 he had chronic fainting spells related to low blood flow to
8 the brain? He is taking us through his investigation into his
9 opinion as to why these injuries were caused by the lead.

10 So I don't see the prejudice to the defendants for
11 him not using the magic words. It's not as though anything
12 would change if Dr. Bithoney today submitted an affidavit or
13 at the very end of his deposition or at the very end of each
14 of his reports, he said, "Based on the foregoing, I have
15 undertaken to provide a differential diagnosis. I have ruled
16 out most other factors, and I believe that the cause of these
17 injuries is the exposure to lead."

18 It's in there.

19 THE COURT: Okay. So, Mr. Campbell, what the cases
20 suggest is you must do a differential diagnosis. You must
21 undertake that, otherwise it's hog wash, we don't know what
22 caused this harm. But here, Mr. Stern is arguing that
23 Dr. Bithoney did that by rule -- there was the normal
24 pregnancy, the normal birth weight, there was X, Y, Z that
25 he's aware of. He considered.

1 And why is that not sufficient under the cases? What
2 cases say it must be spelled out in the report what was ruled
3 out? He's clearly ruled out fetal alcohol. He's ruled out
4 birth trauma. He's ruled out some traumatic event or
5 something in early childhood. It says, "Medically, Emir is a
6 well child. He had a number of the usual childhood illnesses,
7 pink eye, and so on.

8 "His growth and development are within normal limits,
9 and his growth charts evidence normal weight and height." And
10 so -- and Dr. Bithoney is somebody with significant experience
11 in this area. So why is that not enough? Why can't you say
12 to him -- cross-examine him of -- you're going to know at
13 trial everything that causes ADHD besides lead.

14 And you're going to say, "Did you rule out -- isn't
15 it true you never ruled out this, this, and this?"

16 MR. CAMPBELL: It's not sufficient, Your Honor,
17 number one, because the cases require it. Number two, we just
18 heard a legal argument that that's what these things mean.
19 Dr. Bithoney didn't say what these things mean. This sounds
20 to me like a medical history and not a review of issues for a
21 differential -- a diagnoses of anything.

22 We don't know from Dr. Bithoney in either his report
23 or any place else why he did this. He doesn't say it. And
24 it's not just magic words, Your Honor. This is a process
25 that's important enough to make its way into Michigan case

1 law, Sixth Circuit case law that requires this to be done.

2 And it wasn't.

3 You know, we can sit here and parse his words, what
4 he actually did say, but there's no doubt that he did not say,
5 "This is my differential diagnosis and why I can say that
6 there are no other causes of which there are numerous known
7 other causes for -- in the case of young Mr. Sherrod, ADHD,
8 not neurocognitive or behavioral disorder."

9 And there are numerous ones. He doesn't go through
10 that and he doesn't do it.

11 THE COURT: Okay. I hear you.

12 MR. CAMPBELL: Thank you, Your Honor. May I move on
13 off of that one?

14 THE COURT: Yes.

15 MR. CAMPBELL: So and then trying to unwind some of
16 this and the arguments made in the briefing, the next one that
17 I wrote down was ruling out other sources of lead.

18 And I heard you yesterday, Your Honor, make reference
19 to Dr. Bithoney and his experience and his interview of the
20 mothers of these four bellwether plaintiffs as the source of
21 -- or the source of ruling out other sources of lead.

22 And, you know, we recite the cases, the Pluck case,
23 Paul Murphy (phonetic). I don't think there's any dispute
24 that the law requires other -- in an exposure case like this
25 one that the plaintiffs burden and the expert's burden include

1 ruling out other sources of lead.

2 There's no doubt, Your Honor, and the testimony is
3 what it is. He spoke to the mothers of each of these
4 plaintiffs. The knowledge base of each of those mothers
5 cannot include things that are relevant here and that there's
6 no indication that they do.

7 And to use as a specific example, in each of the
8 reports by Dr. Bithoney he cites, you know, citywide reference
9 to lead service lines. And you know as we know, the lead
10 isn't in the Flint River water, the lead isn't introduced in
11 the distribution plant. The lead isn't in the main lines.
12 The lead comes from after that. And generally regarded as the
13 service lines.

14 So Dr. Bithoney took the time in the reports to cite
15 to a study saying that -- I believe it's 40 percent -- I stand
16 corrected. Some percentage less than a hundred percent,
17 substantially less than a hundred percent of the homes in
18 Flint have lead service lines.

19 Exactly that number is not relevant here. What is
20 relevant is lead service lines are important to this ruling
21 out. Not all homes in Flint have lead service homes -- lead
22 service lines. And the undisputed evidence is that the four
23 homes at issue for these children do not have lead service
24 lines.

25 THE COURT: But he specifically addresses that, and

1 he talks about the lead quantities for those individuals who
2 were in school or daycare. He talks about what the lead
3 levels were there.

4 He also makes the point that children are not always
5 in their parent's care. They're at other people's homes.
6 They're at restaurants. They're out. They do more than just
7 sit at home and follow their parents' directions.

8 MR. CAMPBELL: My children do, Your Honor.

9 THE COURT: Mine did.

10 MR. CAMPBELL: I believe I understood, Your Honor.

11 THE COURT: Oh, and I think it's Michaels who lists
12 the lead levels at the schools.

13 MR. CAMPBELL: So I believe those issues that will
14 come up in the argument. But those primarily have to do with
15 issues regarding VNA, when our work started, and whether the
16 notion that the plaintiff stopped drinking the water or being
17 exposed to the water.

18 Leaving that aside --

19 THE COURT: But doesn't Bithoney talk about even if
20 these four bellwether plaintiffs had copper service lines that
21 the water passed through lead service lines to get to their
22 homes?

23 MR. CAMPBELL: If he says that, I believe he's wrong.
24 But he says what he says. The lead service lines are kind of
25 the last in the fingers that go out to each of the homes.

1 THE COURT: Okay.

2 MR. CAMPBELL: So my understanding of it, a service
3 line wouldn't have a connection to some other house unless
4 it's a very unusual circumstance.

5 THE COURT: Okay.

6 MR. CAMPBELL: But beyond that, a couple of things.
7 So the basis of the ruling out of other sources is -- the only
8 thing is the interview with the parent. Parent can't know
9 some of these things like lead in soil, lead in paint, lead in
10 dust, lead in food.

11 THE COURT: But he asks about paint or is it Bithoney
12 who asks about paint -- Krishnan.

13 MR. CAMPBELL: My understanding of what Dr. Bithoney
14 asks was essentially, "Are you aware of other sources of
15 lead?"

16 I'd stand corrected if the questions were more
17 particularized than that. But that is my understanding of the
18 question asked, and the answers apparently were no from the
19 parents. But it's not --

20 THE COURT: In the deposition at page 285 to 86, he
21 says, quote, "I've done a lot of evaluations of epidemiology
22 of lead in families' homes, and we typically ask about lead
23 paint and soil and all that, the age of the housing. We did
24 all that."

25 MR. CAMPBELL: Okay. The people can't know that.

1 It's like asking --

2 THE COURT: But he can know when he says did you have
3 -- well, he had somebody assess the likely age of the homes
4 for a connection presumably to the paint.

5 MR. CAMPBELL: Your Honor, if I may?

6 THE COURT: Yeah. Go ahead.

7 MR. CAMPBELL: Given the Rule 702 hearing here, we're
8 dealing with the methodology, if you will.

9 THE COURT: Correct.

10 MR. CAMPBELL: And he did what he did with his
11 questionnaire with a single parent that that has a
12 limitation --

13 THE COURT: Wait. I can't hear you.

14 MR. CAMPBELL: -- that has a limitation as to the
15 knowledge base of that parent. So the methodology that would
16 be employed, whether it's Dr. Bithoney's practice or not is
17 there are homes. You can test it. There is a way to go about
18 doing that.

19 And it is unreasonable to rely upon the statement of
20 an involved party, a plaintiff, to say, "Well, no, I don't
21 know about those things." And in fact -- in fact, there is
22 lead in these homes. And there is, in fact --

23 THE COURT: And so that goes to the accuracy but not
24 the methodology. And so you can cross-examine him with, "Have
25 you had an opportunity to read our expert's report showing

1 that there's lead in these homes?"

2 Because you went into each of them to evaluate it,
3 and would that impact your diagnoses? If you now know that
4 there's X percent lead in the air, dust, and so on.

5 MR. CAMPBELL: We can certainly do that, Your Honor.
6 But in this context of a 702 hearing and what an appropriate
7 methodology is, all I can say to you is the method of simply
8 ruling out by asking a question of an interested party without
9 doing more to investigate when those things are reasonable,
10 accepted, and available and just blind to other available
11 information, that's not cross-examination.

12 That goes to the methodology and the admissibility of
13 it. That's --

14 THE COURT: So does your expert have a different
15 standardized process? Because he testifies in his deposition
16 on page 221 --

17 MR. CAMPBELL: I'm sorry. Which expert, Your Honor?

18 THE COURT: Dr. Bithoney testifies that he used a
19 standard clinical exposure assessment during each parent
20 interview.

21 MR. CAMPBELL: That's -- as Mr. Ringstad said
22 yesterday, that's the testimony, and that's what he says. But
23 it may be a standard interview of somebody. But as long as
24 we're talking about a interview of somebody, that is limited
25 to what that person knows or can know.

1 THE COURT: Of course. But he also -- I mean, these
2 four bellwether plaintiffs had the very good fortune of being
3 raised by a parent. And so who would know more about that
4 child's exposure from birth to the date of the evaluation or
5 interview than the parent who knows -- I mean, we've got one
6 parent says there was some chipped paint in the kitchen.

7 They're answering these questions for these
8 evaluations that are apparently standard in this field. This
9 is his only field. 40 years of experience evaluating lead
10 poisoning and treating it.

11 MR. CAMPBELL: Understood. But can you imagine, Your
12 Honor, if we had one of the parents involved, and we asked a
13 question, "Well, do you know whether there's lead in your
14 paint? Do you know whether there's lead in your soil?" And
15 they say, "I don't know," or "no." That is an uninformed --
16 they cannot know that. They cannot reasonably know that. It
17 is something for an expert analysis or a specialized field
18 analysis.

19 And in the context of this exposure case as it
20 relates to the other cases on this issue, you know, we have --
21 their cases cited about PCBs and other carbon issues that were
22 the subjects of the various cases. And you can't just say to
23 the involved party, "Did you have any other exposure?"

24 That's not reasonable. It's not a proper method.
25 And I have no doubt -- I don't take issue with the

1 questionnaire that -- and the questions that Dr. Bithoney may
2 have asked of the plaintiffs. But that's not an appropriate
3 ruling out of other sources of lead in the context of what we
4 have here.

5 THE COURT: Okay. So why don't we get a response on
6 that.

7 MR. STERN: Your Honor, I just want to know first and
8 foremost that VNA's own reports did not find lead in the soil.
9 And so, I guess, at least in the instance when the parents
10 answered that question, they were answering it truthfully and
11 honesty, because the experts who came in for the defendants
12 who have every right to come in, found that there was no lead
13 in the soil.

14 THE COURT: But apparently they found that there was
15 lead in the homes.

16 MR. STERN: There's a difference between -- and
17 that's cross-examination fodder for Dr. Bithoney, and
18 Dr. Bithoney shouldn't be required to go into homes and use
19 the XRF machine that Mr. Campbell and his team say is
20 unreliable anyway in order to make a determination about
21 whether there's lead in the paint.

22 But it's one thing to have lead in paint. It's
23 another thing to have exposure to lead in paint. The very
24 fact that there's lead paint in a cupboard or lead paint in a
25 closet or lead paint by a -- you know, a panel on a wall

1 doesn't necessarily mean that the child's been exposed.

2 And I take issue with the fact that Mr. Campbell says
3 that a parent would never know if there's been alternate
4 exposures. That's untrue. Kids are supposed to be tested for
5 lead as part of their basic -- as part of their basic visits
6 with doctors up until a point when they're 5 and 6 years old.

7 And if a doctor, if a pediatrician who drew blood
8 from one of these kids found that there was lead in the blood
9 prior to, during, subsequent to the Flint water crisis, there
10 would have been a home assessment that would have been done by
11 the Department of Health, not just in Flint, but in any city
12 to determine what the source of lead is.

13 And so to say that a parent just would not know that
14 there were alternative exposures is completely -- is not
15 accurate. It's inaccurate. With regard to Dr. Bithoney's
16 testimony, this is from his deposition. They ask --

17 THE COURT: When you're reading, be sure not to go
18 too fast.

19 MR. STERN: I'm so sorry.

20 And then go on to say, "The basis of this opinion is
21 the fact that a mere drank leaded water from the Flint River
22 in 2014 and 2015."

23 So on page 285 they finally get to it. And he says
24 -- and they say, "That's the only source of lead that you
25 believe resulted in him having that level of lead in his bones

1 during the entire course of his life; is that right?"

2 Dr. Bithoney says, "That's the only source I was able
3 to identify. You know, I've done a lot of evaluation of the
4 epidemiology of lead in a family's home, and so we typically
5 ask about lead paint and soil and all of that, the age of
6 housing. We did all that."

7 These reports could be -- instead of 14 pages, they
8 could be 50 pages if we got into all of that. But I assure
9 you that we did look for other sources in the parental
10 interview. Didn't find that. Didn't find anything in the
11 depositions. Didn't find anything other than source other
12 than the lead in the water. There may be other sources.

13 Perhaps Mr. Campbell and his team found lead in a
14 home in paint. Perhaps they found lead in soil. Perhaps they
15 have found that a baby formula that one of these kids was fed
16 early on in life, 40 years later or 10 years later or five
17 years later contains lead.

18 But to say that Dr. Bithoney didn't actually
19 undertake to make that determination is inaccurate. And it's
20 -- I don't know if "irony" is the right word. But
21 Dr. Bithoney didn't use magic words to describe a differential
22 diagnosis even though I think it's clear that he did.

23 But VNA and I guess LAN by association takes issue
24 with the fact that he didn't. Conversely, here he actually
25 says exactly what's required of him to say, but now VNA and

1 LAN don't think he did it right or did it well enough.

2 And so if anybody thinks that had Dr. Bithoney
3 actually used the words "differential diagnosis," that we
4 still wouldn't have spent 20 minutes discussing that the
5 differential diagnosis wasn't appropriate based on how VNA
6 reads the case law, then they would be fooling themselves,
7 Your Honor.

8 THE COURT: Okay. Thank you.

9 MR. CAMPBELL: If I could just respond to that.

10 MR. STERN: I had one more point that I --

11 THE COURT: Okay.

12 MR. STERN: I think -- I let it go kind of the first
13 time earlier today when there was a discussion about kids in
14 Flint. You know, well, we've got to look at kids in Flint
15 pretty much different than anywhere else.

16 There's now been an insinuation that these are
17 plaintiffs. You can't rely on them. You can't trust them
18 when -- Mr. Campbell said when Dr. Bithoney asked of the
19 plaintiffs, well, these are plaintiffs, insinuating they have
20 an interest in this, and they would be disingenuous --

21 THE COURT: I didn't -- what I heard in this latter
22 was simply that if Dr. Bithoney said, "Were there any other
23 sources of lead," and the parents said, "no," they wouldn't
24 know what the sources of lead are necessarily.

25 MR. STERN: I always try and be respectful and I am.

1 But in this instance, I respectfully disagree, because he
2 actually said, "These are plaintiffs." If he said, "These are
3 parents," totally understood. You know, these are folks who
4 don't have an environmental degree, and they can't articulate
5 or even know what it means to have lead in soil.

6 But the insinuation that because these are
7 plaintiffs, they're going to make a comment that might not be
8 wholly truthful or inaccurate struck me in a way that's
9 different than in a way that it struck the Court.

10 THE COURT: Okay. Mr. Campbell.

11 MR. CAMPBELL: Your Honor, I clearly meant the
12 comment in the way you interpret it. Thank you.

13 THE COURT: Okay.

14 MR. CAMPBELL: A couple of things. I forgot to
15 mention that lead is, I think, admittedly everywhere in the
16 environment and probably in every body. So that no other
17 sources, it just doesn't square with reality.

18 But also on the issue of the questionnaire and other
19 sources, the highest blood lead level that was ever obtained
20 on any of these children was for young Plaintiff Ware. And it
21 was, I believe, in 2009 long before the water switch.

22 And that establishes, I believe, without any doubt
23 that there had to be another source somewhere.

24 THE COURT: Well, Dr. Bithoney agrees that he's asked
25 in his deposition, he agrees that lead is quote/unquote

1 "everywhere." But he says that no other source would have
2 caused, and he says, "Thousands of micrograms of lead in these
3 children's bones."

4 And the blood lead levels, I think we know about the
5 half-life issue with blood lead levels. So if a particular
6 plaintiff on a particular day didn't have an extremely
7 elevated blood lead level, it doesn't mean they exposed.

8 MR. CAMPBELL: Again, Your Honor, this blood test
9 that I referenced was long before the water switch, and
10 therefore cannot be related to the water. It is something
11 that the parent obviously knew about, because he had to take
12 the child to -- for the testing. And it was not reported in
13 the parental interview from what I gathered, because there
14 were no other sources.

15 So it's an important point not only because it
16 establishes, one, there has to be another source. And number
17 two --

18 THE COURT: But how did you learn about the blood
19 lead test? Because it's listed in the medical review in the
20 report.

21 MR. CAMPBELL: I learned about this blood test just
22 from discovery that we all have. It's referenced in the reply
23 brief at some point.

24 THE COURT: I think it's in the report.

25 MR. CAMPBELL: In the -- I think it's a blood lead

1 level of young Mr. Ware -- I'm sorry, Ms. Ware.

2 THE COURT: Daylaana Ware. Is Daylaana a boy or a
3 girl?

4 MR. CAMPBELL: Girl.

5 THE COURT: Okay. That's what I thought.

6 Okay. I'll look for it, but thank you.

7 MR. CAMPBELL: My point is that it shows prior
8 exposure, and it shows the limitations of simply using the
9 parental interview.

10 And just one point about the home inspections that
11 were done. It isn't just because lead is found that there was
12 -- I'm sorry -- that there is a blood test that shows an
13 elevated lead level like Daylaana Ware's blood test in 2009.
14 It has to be over 5 to initiate -- I believe it's over 5 to
15 initiate an assessment of the home.

16 THE COURT: Okay.

17 MR. STERN: Your Honor, with regard to the previous
18 blood lead level, one of the reasons why we have these cases
19 is because there's going to be a population of children in
20 Flint who had prior elevated levels before the water switch.

21 And to take Mr. Campbell's argument at face value
22 would essentially say, "Well, someone was hit by a car in
23 2009, so any damage that occurs to them from being hit by a
24 car again in 2014 doesn't count, because they were already
25 damaged once by being hit by a car."

1 Dr. Bithoney talks about lead eloquently,
2 effectively, and at great length being a dose response
3 disease. And so the fact that a child may have had an
4 elevated lead level prior to the water switch or prior to what
5 is being alleged in terms of liability on behalf of a
6 defendant doesn't change the fact that there could still be
7 damage.

8 That's just something that has to be addressed at
9 trial by an expert to quantify on some level why the previous
10 exposure either meant nothing to the second exposure or how
11 the second exposure enhanced what had previously occurred.

12 THE COURT: I think Mr. Campbell based on his
13 briefing is going to get to that, about whether any -- well, I
14 guess that might be later, whether any additional molecules of
15 lead will harm these individuals. So I think we are
16 definitely going to get to that.

17 MR. CAMPBELL: Your Honor, I just -- the point about
18 the prior lead test is not damages and certainly not car
19 accidents and two different years. It has to do with it's
20 proof positive that there was some other source before the
21 Flint water.

22 THE COURT: Yeah. But what I hear Mr. Stern saying
23 is even if there was a car accident in '09, if there's another
24 one in 2014 that caused harm, we don't disregard it, because
25 there had been a previous car accident in '09.

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1 MR. CAMPBELL: No doubt, but --

2 THE COURT: And I think page 2 of the Ware report,
3 Dr. Bithoney indicates that he saw information about a third
4 blood test of 2 micrograms per deciliter but didn't see it in
5 the medical records. So he's aware that there was an earlier
6 blood test that showed some lead.

7 MR. CAMPBELL: And, again, we're not dealing with
8 traumatic injuries in a car crash that are separate. We're
9 dealing with exposures over time. And this prior exposure on
10 the issue of the ability to rule out other exposures on the
11 one basis of a questionnaire from the parent is relevant to
12 this inquiry.

13 I'm not saying that there couldn't be --

14 THE COURT: Oh, it's certainly relevant. But it
15 doesn't rule out a conclusion that the bone lead level that
16 Ware had was impacted significantly by the exposure from the
17 water.

18 MR. CAMPBELL: We don't know that, Your Honor,
19 because Dr. Bithoney didn't take it into account, because he
20 doesn't talk about it. He says specifically, "There's no
21 other exposures."

22 THE COURT: Okay. Okay.

23 MR. CAMPBELL: So he doesn't account for it. And it
24 calls to question on a method logical basis why would you rely
25 upon a questionnaire from a person who knew about this but,

1 you know, forgot about the prior test? And it goes to the
2 unreliability of relying upon the single data point of the
3 questionnaire.

4 So that's the point I'm trying to make.

5 MR. STERN: If I may just respond briefly. He does
6 account for it. It's actually in his report. And because he
7 didn't see it in the medical records, the actual only way that
8 he would have been able to obtain that information would have
9 been from the parent interview.

10 And a parent can still say, "I am unaware of any
11 sources of lead," while simultaneously telling Dr. Bithoney
12 that the child had an elevated lead level at a different time.
13 So those two things --

14 THE COURT: I think he got it from Ware's mother's
15 deposition is where he got it. So he looked at those
16 depositions. He did his own interviews. But I think he --
17 the point he makes is that there are everyday exposures that
18 all of us have been supposed to lead, but they wouldn't cause
19 the level of elevation that these plaintiffs have. That's
20 what I got out of his report.

21 And I understand what you're saying is that he just
22 simply didn't do the math. He didn't subtract it, and he
23 didn't acknowledge it that there are other sources for each of
24 these plaintiffs. But that doesn't attack the methodology.

25 He used standard methodology in his questioning, in

1 his evaluation. He looked at the depositions, the medical
2 records, etcetera. Dr. Krishnan's evaluations.

3 And it goes to the weight the jury would give to this
4 testimony.

5 MR. CAMPBELL: Your Honor, I understand what is
6 likely to be your ruling.

7 THE COURT: Okay.

8 MR. CAMPBELL: But just --

9 THE COURT: And I'm not saying it's without concern
10 about the differential diagnosis. I mean, there may be some
11 things that ultimately come in, and some things that don't.
12 But I'm just --

13 MR. CAMPBELL: To be clear, we disagree and for the
14 reasons in the briefing and this argument.

15 So with that, Your Honor, I'd like to move on.

16 THE COURT: All right. We'll keep going until about
17 noon. Oh, yes to a break now. Okay. Let's take a
18 five-minute break, and then we'll come back and work a little
19 longer.

20 (Brief Recess)

21 THE COURT: Please be seated. Thank you.

22 Okay. Mr. Campbell.

23 MR. CAMPBELL: Thank you, Your Honor. I just wanted
24 to raise one point probably apprised to all of this but to
25 just raise for Your Honor's attention, a case Sardis, I think

1 I have that right, S-A-R-D-I-S. That's a Daubert case that
2 advises that the Court's gatekeeping role can't be abandoned
3 to cross-examination when given -- if there's issues that 702
4 would address.

5 THE COURT: No. I don't know if I've looked at the
6 Sardis case, to be honest. I might have in all of this. But
7 I certainly know that we have got -- the expert has to be
8 qualified under 702 and the Daubert standard and the specific
9 requirements narrowing it even further that the Sixth Circuit
10 has set forth.

11 So what my intention is to ultimately at the
12 conclusion of this two days of oral argument is to go back and
13 go through all of the arguments yet again on my own and make a
14 determination as to whether they meet the Daubert standard or
15 whether the argument is just going to what the weight of that
16 testimony should be.

17 Are you actually able to say that the testimony is
18 not scientifically sound? That it's junk science? I'm
19 required to keep out junk science and all of that.

20 So it's not my intention to say, "Never mind. I'm
21 not going to do that part of my job, and instead, what I'm
22 going to do is just let you all go at it on
23 cross-examination."

24 So thank you for that reminder. But -- you know, the
25 other thing about Daubert that is emphasized in the In

1 Re Scrap Metal case is that not every factor of the Daubert
2 analysis, the five general factors, will apply in every
3 instance.

4 So I'll figure out what applies in a person like
5 Dr. Hoaglund versus someone who's doing something very
6 different, like Mr. Crakes. So but thank you.

7 MR. CAMPBELL: Your Honor, thank you for that.

8 I'd like to turn to a couple of points that I heard
9 from -- we all heard yesterday the arguments. But I wanted to
10 raise them just to put them on the record and, you know, for
11 to make the position that we've identified in the briefing
12 clear.

13 And that is because of the argument that we believe
14 to be true that the bone lead testing offered by Dr. Specht is
15 not reliable, and that's the only basis on which Dr. Krishnan
16 rules in lead here. That because the foundation of
17 Dr. Specht's bone lead testing is unreliable for the reasons
18 we argued yesterday, that Dr. Krishnan can't rule in lead.

19 THE COURT: Okay. And one of the reasons that I set
20 up this argument with Dr. Specht's -- with the motion with
21 respect to Dr. Specht before this, before Dr. Krishnan and
22 Dr. Bithoney is because I wanted to hear every possible
23 argument about Dr. Specht.

24 And there's -- of all of these experts, there's one
25 who I can tell you now that having evaluated everything I

1 heard yesterday as well as everything I read in this briefing
2 as well as everything I heard in the form of an objection to
3 the partial settlement, I think he's qualified to testify as
4 an expert.

5 And you will have an -- and this is where the
6 opportunity for cross-examination comes in. Because there are
7 some weaknesses in -- I think there may be some weaknesses in
8 his testimony. But that, I think, is safely in the realm of
9 my gatekeeper function to permit in and then to allow
10 cross-examination and a contrary expert to testify about the
11 accuracy of his testing.

12 MR. CAMPBELL: Understood, Your Honor. And again,
13 I'm raising this just for the --

14 THE COURT: For the record.

15 MR. CAMPBELL: -- for the record, because it is
16 foundational to what Dr. Bithoney has to say.

17 THE COURT: It is.

18 MR. CAMPBELL: And secondly as a --

19 THE COURT: But it's not just Dr. Bithoney who
20 suggests that boasting for lead is in some ways the gold
21 standard. I think it's in the toxicology profile that -- so I
22 just offer that.

23 MR. CAMPBELL: I think you -- when you said
24 Dr. Bithoney you meant Dr. Specht?

25 THE COURT: No. For doctor -- I think Dr. Bithoney

1 -- in looking at his report and his reliance on the bone lead
2 and his sort of reverse engineering of what that might be
3 equivalent to in terms of a blood lead level, I think that
4 it's clear that because the -- a good deal of the literature
5 talks about blood lead levels, he needs to try to figure out
6 what do these bone levels tell us.

7 But also the toxicology profile suggests that bone
8 testing is an important way to figure out what the lead load
9 is in any given person.

10 MR. CAMPBELL: I'm going to get to that issue. I
11 think, Your Honor, just one more of the foundation points I
12 wanted to make.

13 Bone lead testing doesn't give us or anybody, even
14 Dr. Specht a -- doesn't go to timing --

15 THE COURT: No.

16 MR. CAMPBELL: -- and this is the issue we talked
17 about yesterday that was deferred until Dr. Krishnan. And
18 because the same reason. We challenge the reliability of the
19 bone lead testing, so it's not proper foundation. Understand
20 Your Honor disagrees. But that's the position that we
21 maintain.

22 So without a bone lead testing, there's no way to --
23 I'm sorry. I'll start again.

24 This goes to the need to rule out other sources of
25 lead and why the argument regarding ruling out other lead is

1 so important given Dr. Krishnan's reliance on bone lead
2 testing. The house of cards goes from the bone lead testing
3 to ruling out, because bone lead testing doesn't tell us
4 anything about timing. You need to rule it out.

5 So in the context of these particular facts, that
6 requirement of Michigan law is prominent and very important.

7 Having said that, Your Honor, heard your ruling, and
8 I understand that. But I just wanted to make that clear that
9 we think on a couple of grounds, the reliance on bone lead
10 testing is fatal to Dr. Krishnan.

11 Moving to the --

12 THE COURT: Dr. Bithoney.

13 MR. CAMPBELL: Dr. Bithoney.

14 THE COURT: Okay.

15 MR. CAMPBELL: I tend to do that generally, Your
16 Honor.

17 THE COURT: I notice that.

18 MR. CAMPBELL: I can't believe I haven't done it up
19 to this point.

20 THE COURT: No, you have. You have.

21 MR. CAMPBELL: One of my partners is always on me.

22 THE COURT: Consistency is good.

23 MR. STERN: I'd just like to note that since we've
24 returned from the break that all the references that were just
25 made to Dr. Krishnan I think were intended to be Dr. Bithoney.

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1 THE COURT: Yes.

2 MR. STERN: I didn't want to interrupt, but I think
3 that's true.

4 MR. CAMPBELL: Thank you. I did.

5 THE COURT: Okay. All right.

6 MR. CAMPBELL: I'd like to move, Your Honor, to the
7 question you posed to the lawyers about Dr. Bithoney and
8 whether his specific -- whether the specific injuries
9 identified by Dr. Krishnan need to be correlated.

10 And as we described at length in the briefing, we
11 strongly believe that they do and that the specific injuries
12 of the combined neurocognitive neurodevelopmental issue that
13 Dr. Krishnan sees for three of the plaintiffs; the mood
14 disorder she sees for young Ms. Teed and the ADHD that she
15 sees for young Mr. Sherrod.

16 There is no support, reasonable support in the
17 literature that correlates those issues to lead. The studies
18 that Dr. Bithoney relies upon have to do with blood lead
19 levels, not bone lead studies.

20 The CDC and I believe -- well, there is evidence,
21 there is evidence in the literature that there is not enough
22 to correlate the two or to draw information and reasoning from
23 studies regarding blood lead levels -- a phrase that has to be
24 spoken very carefully -- blood lead levels and bone lead
25 testing.

1 There is insufficient support to correlate the two.
2 And Dr. Bithoney's efforts to do so is as we've explained in
3 the briefing and for those reasons, unreliable in this
4 circumstance.

5 THE COURT: Okay.

6 MR. CAMPBELL: I would add that not ruling lead in,
7 again I've heard Your Honor --

8 THE COURT: And that's why he attempts this reverse
9 engineering from bone to blood.

10 MR. CAMPBELL: Right. And that is for the reasons
11 we've explained in the briefing, it's unreliable in the
12 circumstance. There's no support for that. And the two are
13 different.

14 And you can't convert reasonably blood lead levels to
15 bone lead levels, and there's nothing to suggest that any bone
16 lead levels by any of these plaintiffs correlates to a blood
17 lead.

18 THE COURT: Well, he explains how he made that
19 calculation and what he based it on.

20 MR. CAMPBELL: That is true.

21 THE COURT: Okay.

22 MR. CAMPBELL: But there is nothing to support that
23 novel opinion other than Dr. Bithoney. And, in fact, there is
24 statements, I believe the CDC cited in our brief, whatever the
25 citation is in the brief, that the two don't correlate, and

1 you can't draw conclusions one to the other.

2 But in any case, it's another foundational issue
3 related to bone lead testing that -- for all the reasons that
4 we've stated and I've now stated it again, that it shouldn't
5 be considered by the Court because of the reasons we put
6 forth.

7 The next issue that I would take up, Your Honor, is
8 the absence of a fit, if you will, between Dr. Bithoney's
9 opinions and VNA and the start of our work in Flint in
10 February 2015.

11 There is evidence before Your Honor that from the
12 parents who testified at deposition that either stopped
13 drinking the water or substantially reduced ingestion of water
14 by that time.

15 THE COURT: Correct. And Dr. Bithoney, I think,
16 combined with Dr. Michaels talks about alternative sources of
17 water, I think we talked about that earlier this morning, that
18 these children could have ingested outside of parental
19 supervision.

20 MR. CAMPBELL: Your Honor, the operative phrase there
21 is "could have." And this is -- what is the evidence of that?
22 We all know that children can and do things that no one
23 expects. But that doesn't change the fact that in the context
24 of this case and this litigation, facts have to be proven,
25 even fundamental facts need to be proven, and those are rank

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1 speculations -- I'm sorry.

2 THE COURT: Are these the sorts of things that an
3 expert testifies about? I mean, you have children. You know
4 your children don't always act in rational, anticipated ways.
5 Jurors will have children or were once children.

6 And that, to me, doesn't seem like the type of thing
7 we need an expert to testify to. That's where I always tell
8 the jurors, "Don't leave your common sense at the door of the
9 courthouse. Bring it in here. We want your life experience
10 to inform your understanding of the facts in the case."

11 And what jurors don't have, generally speaking or we
12 exclude them if we think they do, is an understanding of
13 complex, specialized areas of science and medicine and
14 engineering. So that's where we bring the experts in to
15 inform them.

16 But simply the idea that Dr. Bithoney assumes that
17 children are going to have exposure to water outside of
18 drinking in front of their parents, he knows the ages of these
19 children. It seems unremarkable to me, and it seems like a
20 common sense sort of thing.

21 And you can certainly cross-examine him on this for
22 sure.

23 MR. CAMPBELL: You've hit on a couple of things. And
24 I would say that an expert testifying that children may do
25 something that they don't -- may do something is something not

1 for expert testimony. It doesn't -- for the reasons you
2 articulated; it doesn't help the jury.

3 But most importantly on this point, however
4 fundamental it is, it is a key fact that needs to be proven in
5 this case. So perhaps at a later time, motion in limine time,
6 the issue of not speculating what children may have done.

7 The best analogy I can think of, Your Honor, is in a
8 red-light-green-light case, someone needs to prove that
9 someone else ran a read light. We know that people run red
10 lights -- not that I've ever done it.

11 THE COURT: Right.

12 MR. CAMPBELL: But it happens. Right? But in those
13 cases, someone has to prove it. This is what I saw and
14 observed. The same would pertain here. It would be rank
15 speculation on such a key point that, "Hey, children do a lot
16 of things, and they may have drank water that was
17 contaminated."

18 And remember, just because there's water, doesn't
19 mean that it's tainted with lead, even in Flint. I mean,
20 there has to be evidence that there was lead in that water.
21 So I think we're a couple of steps beyond where we need to be.
22 But the point that I want to make is there's no fit between
23 Dr. Krishnan and VNA in February 2014 and exposure to --

24 THE COURT: 2015.

25 MR. CAMPBELL: -- '15, Your Honor. Sorry. There I

1 go again.

2 THE COURT: But Dr. Bithoney, if I understand his
3 reports, he's not making an assessment with respect to VNA or
4 LAN or both. He's a general causation expert and specific
5 about lead. And the plaintiffs, if I understand it, have
6 other testimony from parents.

7 At least, I started trying to get prepared for the
8 summary judgment portion of this, at which point I could no
9 longer do that, because this took over my life.

10 But there's testimony from parents about bathing,
11 like D.W. stopped drinking the water in mid-2013, but
12 occasionally bathed in tap water and was exposed at school and
13 elsewhere in 2015.

14 I mean, so that's -- I don't see Bithoney as the
15 person who's pinning this on VNA or LAN. I see Bithoney as
16 talking about general causation, specific causation with
17 respect to lead in the water. And there's going to be other
18 witnesses that say what the timing was for the exposure for
19 these individuals.

20 MR. CAMPBELL: So I agree with that, Your Honor, but
21 I would add that for VNA and our circumstances where we came
22 to Flint in February of 2015, I understand that there's an
23 issue from the plaintiff.

24 THE COURT: Well, there is the 2014 issue that we
25 talked about yesterday too.

1 MR. CAMPBELL: And that's part of the summary
2 judgment. And I'm sure we're going to resolve all of those
3 issues before trial.

4 But for this moment on the issue of exposure be --
5 after February 2015 there is -- Dr. Bithoney agrees that there
6 would be an alternative exposure before the time when we are
7 responsible.

8 So in order to say that we are responsible, VNA is
9 responsible for the alleged specific exposure, he would need
10 to identify and quantify that exposure from February 2015
11 onward, and that is absent in this.

12 THE COURT: You know, what occurs to me about that
13 argument, which I saw, is that there are certain things that
14 cannot be done. If these children were not being tested on a
15 monthly basis from April 2014 to January 2016 or something,
16 it's going to be very difficult for anyone to parse exactly
17 how much exposure happened on what date.

18 We have bone lead levels. We have some blood lead
19 levels to look at. And then we're going to have testimony,
20 and I think the jury will have a very challenging job to
21 figure there out. But --

22 MR. CAMPBELL: Again, Your Honor, perhaps for a
23 different day, but perhaps how it relates to Dr. Krishnan, the
24 burden of proof is on the plaintiffs. The burden of proof is
25 on the plaintiffs to establish exposure as to VNA.

1 On this particular issue it is undisputed that there
2 is a prior exposure for which, you know, resolving the Detroit
3 issue would not apply to VNA. That's the plaintiffs' burden.
4 And if there's an absence of proof there, it remains the
5 plaintiffs' burden.

6 THE COURT: Correct. But I don't think Bithoney has
7 to make their whole case.

8 MR. CAMPBELL: He certainly does not. But if this
9 doesn't -- well, I agree, Your Honor.

10 THE COURT: Okay. Anything further?

11 MR. CAMPBELL: What's that?

12 THE COURT: Anything further?

13 MR. CAMPBELL: Yes, Your Honor. I would like to
14 address -- we talked yesterday about the no-safe level of
15 lead. I don't think that is necessary for anything more.

16 It's the no -- known safe level of lead here. It's
17 in our briefing. In this, we cite the cases Nelson, Lawry
18 (phonetic), Condra (phonetic), simple presence in the
19 environment isn't enough. And I'll rely upon the arguments in
20 the briefing.

21 The final thing, Your Honor, is more of the future
22 injuries. Dr. Bithoney includes two; one would be the
23 so-called lag effect, his phrase, I believe, in his report.
24 And the second would be a myriad of injuries that, quote, "May
25 be suffered in the future," I believe.

1 Speaking of the lag effect, Dr. Bithoney has
2 identified some research regarding traumatic brain injuries.
3 That's obviously not what we have here. They are
4 substantially different than the claimed injuries here; mild
5 neurocognitive/neurodevelopmental injury, ADHD, and mood
6 disorder.

7 It's not traumatic brain injury. That's his only
8 source for this. These children at this point in time, by all
9 accounts, are doing well in school. They're well adjusted.
10 They -- the comments from the various observations about them
11 are that they're doing well at this point.

12 And to suggest that there's some un-manifested injury
13 that doesn't exist now is in violation of the law that we've
14 talked about in the previous argument, and I would stand on
15 those cases.

16 The same is true -- and this issue as to other
17 physical injuries, I believe Dr. Bithoney might have
18 referenced cardiovascular disease or some other things. These
19 are identical to the issues that were raised in the Graziano
20 argument. And they're simply not manifested. These are
21 conditions that these plaintiffs do not have, and they should
22 be excluded.

23 THE COURT: And from my perspective, I think there
24 are two different things, which I think you acknowledged; one
25 is the so-called lag effect that refers to known symptoms

1 worsening over time that he discusses or appearing manifesting
2 in more severely in the future than they are in the present.

3 And the other is the separate diagnosis or diagnoses
4 that these plaintiffs at the present do not have, which I
5 think is similar to the issue we discussed yesterday.

6 MR. CAMPBELL: Yes, Your Honor. The reasoning and
7 the basis would be as we set forth in our briefing. The case
8 law I think pertains, and I would emphasize that the lag
9 effect in a brain injury is not something that refers to the
10 DSM diagnoses or the diagnoses that Dr. Krishnan has
11 identified.

12 It's not these injuries and the gap between the paper
13 cited by Dr. Bithoney and what we have is too great here. And
14 that's why it's a Rule 702 Daubert issue.

15 THE COURT: Okay. Okay. Thank you.

16 MR. CAMPBELL: Thank you, Your Honor.

17 Mr. Stern.

18 MR. STERN: Unless Your Honor has any questions, I'm
19 happy to stand on the briefs at this point. I would agree,
20 Your Honor, with regard to the types of injuries being
21 described. I think the discussion yesterday related to
22 Dr. Graziano is equally applicable to Dr. Bithoney today.

23 There's a significant difference between being
24 diagnosed with ADHD or another neurocognitive deficit and the
25 manifestation of that injury than there is with Dr. Bithoney

1 predicting the child's going to come down with colitis or some
2 other injury that has not yet manifested itself.

3 It doesn't mean he's not qualified to discuss the
4 various effects potentially of what lead poisoning does. But
5 if he can't apply those -- if he can't, based on his own
6 review of the records and scientific research -- he can't
7 predict it for these kids without some more evidence.

8 And then in terms of the lag effect, if you want me
9 to address it, I'm happy to, but I think our brief is pretty
10 sufficient on that point.

11 THE COURT: Okay. No. I think I'm okay. All right.
12 Well, we're doing well time wise. So what we'll do is take a
13 break, and we have left to go Michaels and Crakes. And so why
14 don't we return at 1:00 o'clock.

15 Does that give you enough time, or do you need a full
16 hour?

17 MR. CAMPBELL: That's fine, Your Honor.

18 MR. STERN: 1:00 o'clock's great.

19 THE COURT: All right. Thank you, very much. And
20 I'll see you at 1:00 o'clock.

21 (Brief Recess)

22 THE COURT: Please be seated. Okay. We are now up
23 to VNA's motion to exclude Dr. Michaels. But I'm not sure --
24 did I check in with LAN about whether there was anything you
25 wanted to add on our last motion?

1 MR. KENT: No, Your Honor. By the way, Mr. Mason has
2 left this in my capable hands for the rest of the afternoon.
3 I told him he didn't need to stay around.

4 THE COURT: All right. Well, thank you.

5 MR. KENT: Thank you, Judge.

6 THE COURT: Thank you.

7 Okay. So do we have Mr. Ringstad on this?

8 MR. RINGSTAD: Thank you, Your Honor. And good
9 afternoon. So Dr. Michaels is a toxicologist. And he has a
10 lot of different opinions. Those have been thoroughly briefed
11 in the Daubert papers that we filed. I did want to highlight
12 for the Court a couple of areas of particular concern if I
13 can.

14 And the first area of concern is the exposure
15 opinions that Dr. Michaels proposes to offer to the jury down
16 the line.

17 He characterizes the exposures for these individual
18 children as -- well, not in quantitative terms but in
19 qualitative terms, and he describes them as I think
20 incremental exposures or as persistent exposures, and I'm not
21 nitpicking with that labeling.

22 What has my concern, Your Honor, is how Dr. Michaels
23 arrives at those conclusions of persistent and incremental
24 exposure.

25 Dr. Michaels has a -- he has a problem with these

1 individual children, and that is a lack of data. And he's
2 pretty forthright about it. You can see it in the report.

3 THE COURT: Yeah. And then he speaks about
4 probabilities instead of absolute certainties. And we know
5 from In Re Heparin Product Liability Litigation, which is
6 admittedly a district court case, but it's here in the Sixth
7 Circuit, that, "To be considered appropriately scientific, the
8 expert need not testify to what is known to a certainty, but
9 must only state an inference or assertion derived by a
10 scientific method."

11 MR. RINGSTAD: Precisely. My concern is not about
12 the precision. It is about the inference that is made in the
13 first place and how it's made. And so I just wanted to
14 highlight for the Court to make sure that came through
15 clearly.

16 THE COURT: Okay. It did.

17 MR. RINGSTAD: The deficiencies in the data, let's
18 just say, from the defense perspective deficiencies, there
19 just isn't data about blood lead levels from any of these
20 children, the four children that we're dealing with here
21 today.

22 And there's also a lack of data about water lead
23 levels in the homes. There is also a lack of data, generally
24 speaking, about water lead levels in the schools. And I don't
25 think I need to go through that with Your Honor.

1 What I do want to point out is the way that
2 Dr. Michaels addresses that problem is he goes and looks to
3 aggregate level data. So he looks at data that's in the
4 Pieper, Kelsey Pieper 2018 article. That's data collected by,
5 I believe, Dr. Pieper and Dr. Edwards and others in August of
6 2015 in Flint.

7 And the way I read Dr. Michaels's report and his
8 deposition is that he works backwards from that data down to
9 the individual level to say that there was exposure. He
10 doesn't have the individual level data. He has an aggregate
11 level data, and that is not a reliable inference.

12 If I can give the Court, you know, an example of why
13 that's wrong, I tried to think of one. The best I could come
14 up with was I could ask everyone in this room how many
15 bicycles they own. Some people own zero. Some people might
16 own two or three.

17 I will get an average from that data. I cannot
18 reliably say that Mr. Campbell owns one-and-a-half bicycles or
19 Mr. Stern owns half a bicycle. The inference cannot be made
20 backwards down. And that's what's happening here.

21 THE COURT: I understand that. But Dr. Michaels
22 talks about where he -- how he makes this inference. And I
23 think one of the strengths of his report and testimony is that
24 what we were just saying is he's not saying I know with an
25 absolute certainty how many bicycles Levy owns, but I can tell

1 you how I'm going to figure it out.

2 And it's not just an average of how many everyone in
3 the room owns, because he looks at measurements of lead
4 contents in the plaintiffs' ZIP Codes, in their schools, on
5 Dr. Hanna-Attisha's a citywide analysis, and data of that
6 nature. And then makes a determination that it's more
7 probable than not that these individuals were exposed to lead
8 as a result of the water crisis.

9 MR. RINGSTAD: Your Honor, the ZIP Code level data, I
10 believe that's not available through the Pieper article. I
11 believe the Pieper article notes that there were -- in the
12 data that was collected, elevated -- I'm going to call them
13 P90 levels, 90 percentile lead levels in all the ZIP Codes of
14 Flint.

15 Again, the same problem applies to neighborhood level
16 data and working down from that to an individual residence.

17 Your Honor, if you look at the data that is actually
18 in the Pieper article, there's -- I think it's Table 1.
19 That's a little off the top, so I may be not quite right about
20 that --

21 THE COURT: Slow down. Slow down.

22 MR. RINGSTAD: Sorry.

23 It's attached to one of our briefs. I believe it may
24 be attached to the Graziano brief. Anyway, if you look in
25 that article, the data that's reported by Pieper has

1 15 percent of homes in the sample. I'm not even quibbling
2 with the sampling methodology, but 15 percent of the homes in
3 the sample with less than the 1 microgram per liter detection
4 limit.

5 So zero. 15 percent of the homes per the testing had
6 zero lead.

7 The median value for lead in those homes in the
8 Pieper data was 3 point -- I think it was 3.
9 3-point-something. So half of the homes in that sample have
10 less than 3-point-whatever parts per billion lead in the
11 sampling.

12 So there's a real question there of the accuracy of
13 any inference that's made from that data, especially any
14 inference that says there was incremental lead or increased
15 exposure to lead in these particular homes.

16 That's the problem that I have with what's going on
17 with Michaels. I realize he has limited data. I think the
18 plaintiffs point to a couple of cases; one from the Southern
19 District of Ohio and one from the Ninth Circuit, I think.

20 The Southern District of Ohio case is the Sunnycalb
21 case. We can add alongside our horse case the exploding
22 freight train toilet case. And that's the Sunnycalb case, and
23 then I think that the 9th Circuit case is the Motor Vessel
24 Carissa. If I've got that correct from memory.

25 And that's about filing of oyster beds off the coast

1 of Oregon. Neither of those are on point here.

2 Those -- let me talk about the Sunnycalb case first.
3 That's the exploding toilet case. That case involved a
4 one-time limited duration chemical exposure that was alleged
5 for a very unfortunate freight engineer.

6 And there was no data available. And there was no
7 way to reconstruct that event. And there was probably no need
8 to reconstruct that event reasonably, because there was
9 physical evidence of what had happened.

10 So very different situation than we have in Flint.
11 There is a lack of data, perhaps, and particularly on the
12 individual level as I'm noting. But there is -- there are
13 ways in which Dr. Michaels or others could have tried to come
14 to the exposure -- an exposure conclusion that is generally
15 accepted and reliable. He chose not to do that.

16 And instead, we have incremental exposure and excess
17 exposure, whatever the verbiage is, based on our position is a
18 fundamentally flawed reasoning.

19 And then in terms of the Motor Vessel Carissa case,
20 that focused on specific causation. And there was -- there's
21 noted in the opinion extensive oyster pathology that was done
22 by the expert in question who really took a hard look at what
23 had happened to those oysters.

24 So it's a different case. It's a different situation
25 than we have for Michaels here.

1 THE COURT: Okay. Well, the Pieper study,
2 P-I-E-P-E-R, reported results of sampling from 268 homes in
3 August 2015 in the five primary ZIP Codes in Flint. And
4 Dr. Michaels -- or the Pieper report reveals that all of the
5 bellwether plaintiffs' homes were in one of those ZIP Codes.

6 So that at least places their homes in a ZIP Code
7 with the elevated lead. And then he ends up concluding that a
8 systemwide lead in the water contamination problem existed in
9 the location where these homes were.

10 And another thing that I saw in your brief was this
11 notation again that the four homes had the copper piping. And
12 I think he takes that into consideration in reaching his
13 conclusions. So it's not something he just said, "Oh, let's
14 not worry about that." He acknowledges that and took it into
15 consideration.

16 MR. RINGSTAD: Your Honor, I agree that was
17 apparently considered by Dr. Michaels. If he has ZIP Code
18 level data -- and I don't think that the Pieper data set
19 includes the ZIP Code level data, at least not that
20 Dr. Michaels considered.

21 Then the same problem applies. It's referred to in
22 statistics as the ecological fallacy. It can't work backwards
23 from -- the population level statistic back down to an
24 individual reliably. We don't name it as such in the briefs
25 but the gist of the argument is there. And I think it needs

1 to be noted by the Court and looking at the reliability of
2 Dr. Michaels's opinions.

3 As for the reference by Pieper to systemwide lead in
4 water contamination, the way I read that is that it was a
5 reference to exceedances of what I call the P90 level, the 90
6 percentile level.

7 So if you go for either for the full 268 homes in the
8 data set or if you go ZIP Code by ZIP Code, if you're looking
9 at that P90 level, you would in accordance with the LCR. You
10 would -- you would conclude that there was a potential for
11 systemwide corrosion issues.

12 So that's how we would view that.

13 Your Honor, there's a further issue on the exposure.
14 I think it was eluded to by Mr. Campbell in some of his
15 comments earlier about, I think, Dr. Bithoney. It's that
16 there is no -- there's no way for Dr. Michaels to say whether
17 there was this incremental exposure or excess exposure,
18 whatever, after February 2015.

19 He cannot pinpoint a date. He cannot break apart the
20 timeline. And so as to VNA, that's a significant issue as to
21 a shortcoming of the Michaels report.

22 THE COURT: I think that Dr. Michaels is being
23 presented as a general causation expert. So I don't think
24 that he's trying to discern exactly when the exposure took
25 place for each individual plaintiff. And I don't think he

1 draws a conclusion specifically of about VNA.

2 MR. RINGSTAD: He doesn't, and he can't, and he
3 admitted that in deposition. As to whether, Your Honor, he is
4 being offered as a general causation or specific causation
5 expert, I struggled with that. I think I picked up the
6 Court's sense on that from the questions that were passed
7 along.

8 But he is offering opinions specific to these
9 plaintiffs about exposure and about the -- he can't say the
10 amounts, but whether there was, he calls it the excess
11 exposure or increment exposure to these plaintiffs.

12 So he is somewhere -- he is somewhere between general
13 and specific causation is how I would categorize him.

14 THE COURT: I think we'll find out more in just a
15 moment.

16 MR. RINGSTAD: One other point, and I'll be brief
17 about this. Dr. -- this is on general causation for sure.
18 And many of the things that we talked about with Dr. Graziano,
19 many of those problems apply to Dr. Michaels as well, and what
20 we tread that ground.

21 But Dr. Michaels goes a step further, and he offers
22 this single molecule one-hit theory. It's a page in his
23 report --

24 THE COURT: Yeah. I saw that, and I'll have a
25 question about whether that's based upon a peer-reviewed

1 study. So I'll ask the plaintiffs that question.

2 MR. RINGSTAD: That was my question, Your Honor -- my
3 point. Thank you, Your Honor.

4 THE COURT: Because see, it's one thing to say that
5 additional exposure causes additional harm and another to say
6 one molecule causes ADHD or something could lead to the
7 conditions that the plaintiffs have, so.

8 MR. RINGSTAD: So, Your Honor, those were the points
9 I wanted to highlight for the Court. The rest is in our
10 briefing. And thank you.

11 THE COURT: Okay. Okay. So who will be --
12 Mr. Walker?

13 MR. WALKER: Yes, Your Honor.

14 THE COURT: Okay. So can you tell me what you --
15 what your purpose is with Dr. Michaels's testimony? Is it
16 general causation, or is it a combination of general and
17 specific causation?

18 MR. WALKER: Somewhere between the two. We identify
19 him as a general causation expert. I think the standard under
20 Pluck and other cases that talk about the general and specific
21 causation dichotomy, the first step is usually exposure.

22 And so part of what Dr. Michaels offers is a basis
23 for showing exposure. Now, obviously once exposure gets
24 considered, that goes into specific causation. He's not
25 offering the ultimate specific causation opinion. But his

1 exposure insofar as it fits in I think is reliable.

2 THE COURT: So he's going to be a general causation
3 expert and an expert who say these individuals were exposed.

4 MR. WALKER: Yes.

5 THE COURT: But he's not going -- you've got Krishnan
6 and Bithoney to take it to the next step of the specific
7 causation analysis.

8 MR. WALKER: Correct, Your Honor. Dr. Krishnan
9 offers a diagnosis of each plaintiff, and Dr. Bithoney makes
10 the ultimate specific causation opinion.

11 THE COURT: Okay. Tell me about the one molecule
12 theory.

13 MR. WALKER: So I read that as being contained in a
14 peer-review article.

15 THE COURT: What peer-review article?

16 MR. WALKER: In this Mason article, the thing that I
17 was going to say beyond that is, you know, I think that
18 substantive law. We're not offering him -- since we're not
19 offering him as a specific causation expert, the places that
20 the single molecule theory becomes problematic are in the
21 specific causation arena.

22 But when an expert says it's a single molecule or no
23 safe lead level or whatever, that any exposure period
24 necessarily equates to specific causation. Those are the
25 cases that VNA cites for example. He is not offering a

1 specific causation opinion.

2 So I believe that is contained in the article. But
3 to, you know, certainly, I think the thing that we want to be
4 careful with is avoiding that issue. Because what he's really
5 there for is to talk about exposure and tracing, you know, and
6 providing it under oath. Right?

7 He ultimately does not say that there's a single
8 molecule that these children have been exposed to. He says
9 there's, you know, 539 days of exposure at home. There's
10 hundreds of days of exposure at schools. He relies on a
11 constellation of data points that created, as the Court noted,
12 a probability of fairly substantial exposure --

13 THE COURT: So on specific causation, he's going to
14 testify as you propose him on exposure that the four
15 bellwether plaintiffs were supposed to increased levels of
16 lead that were second element sufficient to cause harm.

17 But so that's his area. He will not testify that, in
18 fact, the harm took place. Because you've got Krishnan who's
19 got the diagnosis and Bithoney as well.

20 MR. WALKER: That's correct, Your Honor.

21 THE COURT: So where does the one molecule come in?
22 That comes in on sufficient to -- where does it come in?

23 MR. WALKER: I think it's comparable as, you know, to
24 the issue that came up with Dr. Graziano. So it's a similar
25 point. I think --

1 THE COURT: It is a similar point. But what I have
2 to also look at is Rule 403 and the duty under Rule 702 that
3 the evidence be relevant and not be more prejudicial than
4 probative.

5 MR. WALKER: Correct, Your Honor.

6 THE COURT: And the single molecule theory seems to
7 go into that territory that if someone's conduct caused a
8 single molecule of additional lead, that seems very -- like a
9 very different calculation than what Dr. Graziano and others
10 are suggesting.

11 Did you say the Mason report supports that?

12 MR. WALKER: I was trying to find it quickly, Your
13 Honor, and I believe it was contained in there. But --

14 THE COURT: The Mason report instructs that studies
15 have failed to find evidence of a threshold for neurological
16 effects and that recent large scale prospective studies
17 suggest that blood lead levels below 10 micrograms per
18 deciliter significantly worsen intellectual functioning.

19 So it's definitely a report to rely upon. But I
20 don't see the one molecule concept in there.

21 MR. WALKER: Understood, Your Honor. And in candor,
22 I think that you mentioned -- the Court mentioned 403 a moment
23 ago. And I think what I had wanted to say about that is that,
24 you know, going back to Judge Sutton's opinion in Gissantaner,
25 to the extent that Dr. Michaels's opinion or information about

1 a single molecule could be helpful, and I think the Court will
2 consider it's probative value, the Court also has the power to
3 require that it be presented in a way that is not confusing or
4 prejudicial.

5 THE COURT: Let me ask you something on a different
6 subject, which is that it looks like Dr. Michaels relies on
7 some of Dr. Specht's now retracted reference values. So does
8 that need to be corrected or deleted from his report?

9 MR. WALKER: I want to be clear about it. I think
10 that the reference value in question, I had understood that
11 was a Dr. Bithoney.

12 THE COURT: I think it's both.

13 MR. WALKER: It may be both. So what happened in
14 Dr. Specht's deposition was he identified a reference value of
15 10.

16 THE COURT: Exactly.

17 MR. WALKER: And that reference value is, as I
18 mentioned yesterday, derived from testing that Dr. Specht was
19 aware of -- about persons who were supposed to leaded
20 gasoline. And what happened --

21 THE COURT: That was an adult study.

22 MR. WALKER: They were adults who had chronic
23 exposure to lead gasoline.

24 THE COURT: Right.

25 MR. WALKER: So what happened -- and I know this

1 happened in the Bithoney deposition, for example, is that he
2 was given a question that was -- well, you know Dr. Specht
3 recanted that opinion. And so what Dr. Bithoney said is, "Oh,
4 well, if he recanted that opinion, then I need to withdraw my
5 opinion on that score as well."

6 But what Dr. Specht did not do, at least I as read
7 Dr. Specht at his deposition, is that he did not recant that
8 opinion. What he says is, "Oh, the exposure scenario there
9 just isn't very relevant to kids." Now, I guess I would
10 disagree, because I think the comparison seems relevant.

11 But what he's saying is, you know, "We don't need to
12 talk about people getting exposed to gasoline, because I guess
13 the point is it's leaded gasoline. These kids were not
14 exposed to leaded gasoline."

15 I don't think that he -- he does not withdraw that
16 opinion. And so --

17 THE COURT: Okay.

18 MR. WALKER: -- there's no basis for Dr. Michaels to
19 withdraw either.

20 THE COURT: Okay. Any response that you wish to
21 make?

22 MR. RINGSTAD: Just one comment. And that is that
23 the Sixth Circuit Tamraz court, you know, speaks about
24 untested hypothesis not being admissible. And this page 103
25 of the report outlines an untested hypothesis. It's a theory.

1 Dr. Michaels says it might or might not be the most accurate.
2 Whatever that means.

3 This is something I think that in Daubert clearly
4 ends up in the cutting room floor. This is the kind of
5 opinion that a jury does not need to hear, will not benefit
6 from. It will be prejudicial, unduly prejudicial to VNA and
7 to LAN, if I may speak for them as well.

8 THE COURT: Okay. Mr. Mason took off, but I'm sure
9 Mr. Kent will tell him.

10 MR. RINGSTAD: Getting a nod from brother Kent in the
11 gallery, and that will suffice.

12 THE COURT: Okay.

13 MR. RINGSTAD: But that's all I have to say, Your
14 Honor, on Dr. Michaels. Thank you.

15 THE COURT: Thank you. And that leaves us with
16 Dr. Crakes. Professor Crakes. Or was there anything further,
17 Mr. Walker?

18 MR. WALKER: No, Your Honor. Sorry about that.

19 THE COURT: Okay.

20 MR. CAMPBELL: Proceed?

21 THE COURT: Yes.

22 MR. CAMPBELL: Thank you, Your Honor.

23 Okay. Dr. Crakes, he's an economist, and we
24 challenge on Rule 702 grounds his opinions for the reasons
25 that we set forth in the briefing. And I'll address a couple

1 of those points.

2 The first one I'd like to address, again, is Your
3 Honor's question to us in advance of the hearing. And what is
4 the support for the statement that Dr. Crakes should use local
5 as opposed to national wage data in terms of coming to his
6 conclusion.

7 And the basis for that is as we state in the brief,
8 it's the Tenier case (phonetic), which is a case here from the
9 Southern District, Judge Drain, I believe along with the
10 Andler case (phonetic). It's not precisely national versus
11 local. There is not a citation that I have for you on that
12 one.

13 But those cases pertain because in the Tenier case,
14 the concept was to use precise and contrary data that then
15 what was used by the expert doing the analysis there. The
16 expert --

17 THE COURT: Aren't those cases about undue
18 speculation must be -- conclusions based on undue speculation
19 must be excluded?

20 MR. CAMPBELL: They may also hold that, Your Honor.
21 I know them for the proposition that I'm speaking about --

22 THE COURT: Okay.

23 MR. CAMPBELL: -- which is that in doing this type of
24 work, the expert has to use the realistic assumptions and the
25 most appropriate data that would go to the to the particular

1 circumstance.

2 So I -- without calling to mind the actual case, I
3 could see where the extension of that notion would lead to
4 what you said, that it's unsupported.

5 But here's the issue. By using national wage data as
6 opposed to local wage data, Dr. Crakes multiplied by a factor
7 of 100 percent or two times what would be the result if local
8 wage data was in use.

9 And the best analogy that I could come up with in
10 dealing with children -- obviously, there's not a wage history
11 to look at. And I believe in the Tenier case that was the
12 particular issue; the expert had disregarded the particular
13 plaintiffs' wage history and opted for some other metric.

14 But in any case, given that we're dealing with
15 children, there clearly and obviously isn't a wage history.
16 But the best wage history that should at least be considered
17 for somebody in doing a reasonable methodology and in choosing
18 making realistic assumptions as was stated in the Andler case
19 should consider the local wage data from which it would be
20 reasonable to conclude what the analysis would be.

21 So that was the basis --

22 THE COURT: Mr. Campbell, did you take a look at
23 Greyhound Lines, Inc. versus Sutton? It's a Mississippi
24 Supreme Court case, so it's not applying Michigan law. And
25 it's from the year 2000.

1 And I found that very instructive on your argument
2 that we should be looking at local wages in Flint or
3 educational achievement in Flint or even as narrow as from a
4 particular school.

5 And what that case says is that it starts with the
6 conclusion by the Court of Appeals that income from the
7 children should be based on some sort of average income for
8 persons of the community in which they lived. And I think
9 that's what you're saying here. "As far as we can find, has
10 no basis in our law." Of course, that's Mississippi law.

11 But then they say, "It is both unfair and prejudicial
12 to ground the projected future income of a deceased child" --
13 which was the issue in that case -- "on either basis. Both
14 methods result in potentially disparate recoveries for
15 children from affluent communities or with affluent parents as
16 opposed to children from less affluent areas with less
17 affluent parents."

18 And then the court goes on and says, "Today's society
19 is much more mobile than in the past. Additionally, there are
20 many more educational and job training opportunities available
21 for children as a whole today."

22 But then they say something very important. "We must
23 not assume that the individuals forever remain shackled by the
24 bounds of community or class. The law loves certainty and
25 economy of effort. But the law also respects individual

1 aptitudes and differences."

2 And that's what I see in your argument that we should
3 be looking at wage accomplishments of children on a local
4 level. And I think the Mississippi Supreme Court reached the
5 conclusion that Dr. Crakes reaches, which is that we should do
6 what every other -- I think he's done some 3,000 prior
7 reports.

8 MR. CAMPBELL: At least.

9 THE COURT: At least. And it's good to have
10 something you can do, you know. At least he could do it 3,000
11 times. I don't know if I can do anything that often.

12 But he does what is done in this field, which is to
13 use national labor data. We live in a mobile society. We
14 want people to accomplish their highest level that they are
15 capable of accomplishing.

16 And there is nothing to say that the children in
17 Flint are limited by where they were born or what school they
18 go to.

19 So I don't see any support in the law that local data
20 has to be -- is required or even used by any courts.

21 MR. CAMPBELL: Your Honor, I'm unfamiliar with the
22 Mississippi case. I hadn't reviewed it. I don't know
23 whether it's --

24 THE COURT: Understandably. That's fair.

25 MR. CAMPBELL: So what I would request is an

1 opportunity to review it, and if appropriate, submit a filing
2 for you about it. But beyond that, I would say that the case
3 law that I did identify is closer to Michigan.

4 I understand the point, and I'm unaware of a case
5 that requires local versus national wage data other than as I
6 said for the basis for the reasoning.

7 I think that I wanted to start with that, because
8 that was the question you posed to us.

9 THE COURT: Yes.

10 MR. CAMPBELL: But the bigger issue with Dr. Crakes
11 is this: He is -- he can only -- he's an economist,
12 obviously. He has to make assumptions about what it is he's
13 asked to provide his economic opinion about.

14 And he has to do that in a way that passes Daubert
15 and Rule 702 muster as well as complies with Michigan law.
16 And he fails at least on the second prong of that for this
17 reason.

18 He can't assume anything about the health or the
19 diagnoses of what the issues are medically for these children.
20 He has to build off of what Dr. Krishnan has identified.

21 THE COURT: Yes.

22 MR. CAMPBELL: -- and he says that. He also says
23 that he agrees -- this is page 59, lines 12 through 19,
24 page 58, 4 through 7, that he didn't exactly follow what
25 Dr. Krishnan put forth, and he changed that in consultation

1 with Mr. Stern.

2 Leaving that aside, we are not dealing with that iron
3 worker that has a orthopedic or some injury that takes him or
4 her off the job, and there's a calculation to be made. What
5 we are dealing with at best -- which we've challenged by the
6 way. This is another one of those issues that builds upon the
7 others -- we've challenged Dr. Krishnan's percentages.

8 And what Dr. Crakes has done here is assume that
9 they're not going to graduate from high school or they're not
10 going to graduate from college or they're not going to get a
11 degree. And the fact of the matter is there is no basis for
12 that. And what he is calculating is damages that have not
13 occurred, but according to the foundational witness, will not
14 occur.

15 THE COURT: Well, they may occur.

16 MR. CAMPBELL: But that's not good enough.

17 THE COURT: Twenty-five percent. Well, I hear you on
18 this point. I hear you.

19 MR. CAMPBELL: This witness if permitted to do this,
20 will tell the jury about damages that according to the
21 foundational witness will not occur. That is improper.

22 Because he's putting forth 100 percent of the alleged
23 loss wage, and we don't know that that's even going to occur.
24 We've challenged Dr. Krishnan's basis for doing it. But if
25 you were to take the low bound of 25 percent for plaintiffs,

1 three of the four aren't going to have this damage at all.

2 If you take the high bound, 50 percent, two of the
3 four are not going to have this damage. This witness is
4 asking the jury necessarily to award damages for which there's
5 no foundation. And as should be agreed that there's no
6 foundation.

7 THE COURT: Well, I think what he does is he takes
8 the scenarios that Dr. Krishnan says are possible and then he
9 attaches a number and then he walks away. He's done. So he
10 doesn't say it will occur, it's 25 percent likely to occur.
11 He just says high school, college, masters. If these aren't
12 achieved, that becomes the impaired versus if they are
13 achieved.

14 And it's for other witnesses to tell the jury whether
15 these things are going to occur.

16 MR. CAMPBELL: The only witness who can do that is
17 Dr. Krishnan, and we've been over that.

18 THE COURT: We have.

19 MR. CAMPBELL: Your Honor, it's now in your hands --

20 THE COURT: Yeah.

21 MR. CAMPBELL: -- on that issue. But the fact is
22 that even, I believe Dr. Krishnan, if she were here, would
23 say, "No. This is just my broad based assumptions," to use
24 one of her phrases, to put a ballpark on this.

25 It would be improper to give a jury an opportunity to

1 award damages that even the proof is would not occur. And to
2 award damages on a percentage like this. Or more -- this is
3 the kind of case and the kind of situation for which Rule 702
4 Daubert and the other cases are meant for. This is the kind
5 of thing that will prejudice --

6 THE COURT: Well, yeah. I think we're in a Rule 403
7 territory potentially that we have to figure out whether we
8 are or aren't.

9 MR. CAMPBELL: And I would agree with that. And it's
10 coupled with the Rule 702 challenge, because this is
11 unfounded, and there is no assumption to be made that goes
12 with this conclusion.

13 And the importance of this, Your Honor, to cut right
14 to it is these are the numbers. And this is an issue that
15 would clearly confuse the jury. This is not a piece of damage
16 that exists now.

17 This is an effort to predict the future with
18 something that for each of these children has less than a
19 50 percent chance of happening and is not reasonably likely
20 and doesn't fit, most importantly, the Michigan law on the
21 issue.

22 That's my argument.

23 THE COURT: Okay. Thank you.

24 MR. STERN: Your Honor, I was not prepared to discuss
25 Dr. Crakes. Mr. Walker will. But I just want to note that

1 all of these expert's opinions in so many ways are
2 interrelated.

3 And while there may be issues that Your Honor takes
4 with Dr. Krishnan, you have not yet ruled on Dr. Krishnan, and
5 you've made it clear that you're going to look again at all of
6 the materials and the law and consider the arguments.

7 What I don't hear is that if -- there's -- Dr. Crakes
8 is making assumptions. His methodology and the manner in --
9 his qualifications to do so are pristine. The methodology
10 that he uses is pristine.

11 And if, in fact, there's testimony at trial from
12 another expert that a child is unlikely to or whatever Your
13 Honor comes to or the case comes to in terms of what a child
14 may or may not accomplish going forward, if it's part of the
15 same injury or if it's permitted, then that would be helpful
16 for a jury.

17 What Mr. Campbell is arguing now is that because he's
18 assuming that Your Honor's not going to permit Dr. Krishnan in
19 the same way that they assume that Your Honor will not permit
20 Dr. Specht, that Bithoney's assumptions should not be part of
21 his scientific methodology, because those assumptions are
22 based on a false pretense.

23 Dr. Crakes's assumption, because they're based on a
24 false pretense.

25 THE COURT: Let me ask you, and then we'll turn to

1 Mr. Walker, something that I didn't discuss with Mr. Campbell
2 but that I'm interested in, in light of some of the discussion
3 yesterday and this morning.

4 Dr. Crakes makes no prediction about damages for
5 somebody who has schizophrenia, Parkinson's, high blood
6 pressure. So it occurs to me reviewing his report that those
7 are not damages that you're -- you're not seeking money
8 damages for those possible outcomes for lead exposure.

9 You don't have an expert who's going to quantify what
10 schizophrenia would cost to the person in lost wages.

11 MR. STERN: So in the context of your question, the
12 answer is you're correct. We would not.

13 I could envision a scenario where part of a pain and
14 suffering argument for a child could be as they grow older to
15 the extent that they're aware of what's happening to them, and
16 they're unsure of what might happen to them in the future.

17 There could potentially be a pain and suffering
18 argument that has nothing to do with any of Dr. Crakes's
19 calculations and potentially could be the subject to motion
20 practice prior to making that argument at a closing, depending
21 on how the evidence comes in.

22 But to your specific point, there's not a calculation
23 made by Dr. Crakes that Sherrod -- Mr. Sherrod -- sorry.
24 Amele Sherrod is going to suffer from schizophrenia. So based
25 on the calculations I've come up with, that that is quantified

1 as lost earnings of X to Y amount of dollars.

2 That is not part of his calculation, nor will it be
3 or part of anybody's calculation.

4 THE COURT: Okay. So then what we have to do is be
5 careful that that's not what the jury is awarding damages for.

6 MR. STERN: Absolutely. I mean, we would be -- if
7 the evidence presented by experts on lost future earnings
8 doesn't include projections or an analysis associated with an
9 injury that hasn't been presented, but the jury ultimately
10 awards damages for an injury that wasn't presented, it would
11 be reverse I believe on appeal, so --

12 THE COURT: Correct.

13 MR. STERN: -- we are not in any way attempting to
14 nor do we intend to try to convince you, defendants, or the
15 jury that Emir Sherrod will suffer from schizophrenia.

16 That's never been a part of any of the expert
17 reports. And I think that what's --

18 THE COURT: Well, I'm not sure that's true. Because
19 the expert -- we do have testimony that those are some of the
20 outcomes of lead poisoning for some people --

21 MR. STERN: Absolutely.

22 THE COURT: -- but we don't know what percent, and we
23 don't know what likelihood it is.

24 MR. STERN: Sure. And you could -- absolutely. And
25 the -- there are -- there is some education that has to be in

1 a trial like this be imparted upon a jury in general terms
2 that has nothing to do with the actual damages that are going
3 to be sought or awarded.

4 So, for instance, if the jury is able to hear about
5 the composition of the -- the chemical composition of the
6 river water prior to the switch, prior to the switch and with
7 or without corrosion control. Taking away the sampling and
8 the comparison to DWSD, that's an educational component.
9 That's not going to prove that Veolia did something wrong or
10 didn't.

11 And so in that instance, there should be an analysis
12 about whether this educational information is more probative
13 than it is prejudicial to the extent someone doesn't want it
14 to come in.

15 But to simply say that, you know, out of hand, the
16 jury should never know all of the potential consequences
17 associated with lead poisoning, I think it's a little
18 premature to say that.

19 And I don't think Dr. Crakes, in particular, or any
20 of our experts are positing that that outcome is either
21 probable or even has occurred.

22 THE COURT: Okay. But at some point in the next --
23 in the days after today, I will have to decide whether those
24 expert opinions can come in or not. And I have a challenge by
25 defendants that it's more probative -- more prejudicial than

1 probative.

2 And so I look to Dr. Crakes just to see, "Well, is he
3 opining on that?" And he's not. So it looks to me and now
4 you've confirmed that you won't be seeking money damages for
5 conditions that the plaintiffs don't currently have, and we
6 don't have a reasonable medical expectation in the record that
7 they will have.

8 And so I have to figure out what point is the jury
9 getting -- what is an element that's in controversy, a fact in
10 controversy that that would -- that information would satisfy?

11 MR. STERN: So the only caveat -- I agree with what
12 Your Honor just said. And I don't envy you for the task
13 ahead. I understand that it's a lot that you have to do.

14 THE COURT: Thank you.

15 MR. STERN: No, thank you.

16 But what I would say is that I don't concede that a
17 manifestation of the injury that's been diagnosed is the same
18 thing as schizophrenia. So, for instance, a child who today
19 has been diagnosed with and is suffering from ADHD, there's a
20 difference between any expert, whether it's Dr. Bithoney,
21 Dr. Krishnan discussing the future manifestations based on
22 their own experience of what's likely to occur to that child
23 based on the injury that's already been diagnosed versus
24 Dr. Bithoney coming in and saying, "Well, Emir Sherrod's going
25 to be schizophrenic, and that's -- you know, that's not based

1 on anything I've seen in the records. It's just in my
2 experience, kids who are lead poisoned sometimes suffer from
3 schizophrenia in life, and you should award damages to that."

4 And so, Your Honor, I think earlier today even
5 delineated between the -- when we were discussing Dr. Bithoney
6 between those future manifestations of the present diagnosis
7 versus the manifestation of a diagnosis that has not yet been
8 made.

9 THE COURT: Yes. Okay. So does Mr. Walker have
10 anything to add?

11 MR. WALKER: I'd be happy to try to answer any
12 questions, Your Honor. But if Your Honor doesn't have any,
13 then --

14 THE COURT: I do have a question --

15 MR. WALKER: Sure.

16 THE COURT: -- which is, okay, Dr. Crakes gives us
17 these scenarios of not graduating from college. And here are
18 the lost wages or the wage potential that's not achieved.

19 Is there -- can you tell me how he picked these
20 scenarios in that he doesn't give us some college. Maybe two
21 years of college but not graduation gives you an edge in the
22 job market. Or some high school but not all of high school.
23 Or some part of a masters but not all.

24 So how does he pick this, the scenarios that he uses?

25 MR. WALKER: To be sure I understand the question

1 accurately, you know, why is -- he doesn't say ninth grade
2 versus tenth grade or one year of college versus two or three
3 years of college and not finishing.

4 THE COURT: Correct.

5 MR. WALKER: I don't think that it is spelled out in
6 the report. I don't know that the question was asked at his
7 deposition. I think that he provided one number. To the
8 extent that there are questions that VNA would ask about those
9 assumptions, those are the kinds of assumptions that are
10 fodder for cross-examination but not exclusion.

11 THE COURT: So A.T. has a 30 to 50 percent chance of
12 not going to college. And Dr. Crakes tells us the outcome of
13 no college. So you're saying he just took Dr. Krishnan's
14 general cutoffs looking at graduation from high school,
15 college, and some graduate school, and then put those into the
16 national databases and got these outcomes.

17 MR. WALKER: Yes, Your Honor.

18 MR. STERN: Your Honor, I don't want to tag team, but
19 I have to jump in for a second. The fact that Dr. Crakes has
20 a number in his report does not necessarily mean that counsel
21 for plaintiffs is going to ask a jury to award that number.

22 It's very possible at a trial to juxtapose what one
23 expert says. And let's assume for a minute that
24 Dr. Krishnan's opinions are permitted with regard to the 30 to
25 50 percent related to not going to college.

1 Just because Dr. Crakes says that has -- not going to
2 college has a value of a million dollars doesn't mean that we
3 would present to a jury, "Hey, jury, you have to award or we
4 suggest you award or we'd like for you to award a million
5 dollars, because there's a 30 to 50 percent chance that the
6 child's not going to go to college."

7 It's very possible and very likely that, based on the
8 testimony as it comes in, that a plaintiff's lawyer like us
9 would say to a jury, "Take into account the fact that there's
10 a 30 to 50 percent chance that the child doesn't go to
11 college, and take into account that Dr. Crakes has opined that
12 if a child doesn't go to college, it's worth a million
13 dollars, and use your judgment as a jury whether you want to
14 award that job a million dollars or whether you want to
15 discount it by 50 percent or whether you want to discount it
16 by 30 percent."

17 And so just because he's created numbers using a
18 sound methodology in his experience -- sorry. That's -- put
19 me in time out.

20 My point is that these reports -- there are
21 assumptions being made that what's in these reports is what's
22 going to be what plaintiffs' counsel asks of the jury. And if
23 we get to a point in a trial where we are overreaching or
24 where the testimony that we're trying to elicit is
25 unsupported, there's motion practice and issues that can be

1 resolved then.

2 But to say, based on his report, that Dr. Crakes is
3 not qualified, didn't use a sound methodology, and this would
4 not assist the jury is just unfounded.

5 THE COURT: Okay. Then I have one final question,
6 which is: What is the source of the 3.5 percent wage growth
7 assumption that Dr. Crakes puts into his analysis? I didn't
8 see where he told us which national databases he used for
9 that.

10 MR. STERN: If you're looking at me, I don't have
11 anything.

12 THE COURT: He said he used historical data, but we
13 don't know what that -- historical from what database?

14 MR. WALKER: I don't think it's set forth in his
15 report, and I don't recall the question in the deposition,
16 Your Honor.

17 THE COURT: Okay. All right. Mr. Campbell,
18 anything --

19 MR. CAMPBELL: I would say that the argument that
20 Mr. Stern just made about how this could be used is exactly
21 why it must be excluded. By throwing out a number that is not
22 -- doesn't have a factual or evidentiary basis that it will
23 occur, particularly as to a number that the jury could use or
24 grab onto, and if it doesn't have a basis, it's irrelevant.

25 And in this case at this point in the litigation with

1 the Daubert 702 hearing, the reason why you should exclude it
2 is because it's absent a foundation that would be helpful to
3 the jury.

4 And that is this outcome that he's putting millions
5 and millions of dollars on is hypothetical, and it doesn't
6 belong in front of the jury. That's what the Michigan law is,
7 that it needs to be a -- I forget the words even know -- but
8 the cases that I've cited, that's why that law exists.

9 THE COURT: A reasonable certainty.

10 MR. CAMPBELL: Yes.

11 THE COURT: Yes. Okay. Well, thank you, all, very
12 much for your arguments yesterday and today and for the
13 extensive briefing that was filed some time ago.

14 Let me say this. A couple of things. We discussed
15 yesterday a couple of issues that might have some additional
16 briefing, and I want to make sure.

17 One of them was on Mr. Humann, and I think I offered
18 the opportunity for defendants to file a brief by November 9
19 regarding new areas you may want to depose him on. Plaintiffs
20 to respond by November 16.

21 Is that what you have in your records? Okay.

22 I think we also talked about whether additional
23 briefing was being requested regarding Dr. Graziano, and that
24 was related to -- was that related to the items for future
25 damages? General causation regarding physical illnesses.

1 MR. WALKER: That's correct, Your Honor.

2 THE COURT: Yeah. And when -- we can use the same
3 schedule of November 9 and 16th, or tell me if you need an
4 additional time.

5 MR. WALKER: That timeline works for us, Your Honor.

6 THE COURT: Okay. And was there any request for
7 further briefing on Dr. Hoaglund?

8 MR. TERMOLEN: Yes, Your Honor.

9 THE COURT: Mr. Termolen.

10 MR. TERMOLEN: Thank you, Your Honor. I believe you
11 set a briefing schedule and part of that was the plaintiffs
12 are to identify exactly what opinions they intend to use.

13 THE COURT: That's right.

14 MR. TERMOLEN: With Dr. Hoaglund. And I think it was
15 a week from yesterday and then a week from that, Your Honor.

16 THE COURT: Okay. That's right. Thank you.

17 MR. CAMPBELL: And the last issue was the taking a
18 look at this Greyhound Lines case from Mississippi.

19 THE COURT: Sure. You can take a look at that, but
20 it's not going to be helpful for me to know that it's a
21 Mississippi Supreme Court case and I'm to apply Michigan law
22 and that we're in the Eastern District of Michigan in federal
23 court and not in Mississippi in the state court.

24 I just offer the text of that opinion, because I
25 think it said in a more eloquent way than I could say why

1 courts look at national data and not local data when looking
2 at the potential of a human being in our country.

3 We may be diluting ourselves about potential. But
4 every court does it, uses this technique of looking at
5 national wage data, national life expectancies, national
6 educational accomplishments.

7 And so I don't -- you can certainly write to me --

8 MR. CAMPBELL: Your Honor, I promise you that we
9 won't go on a Michigan-Mississippi route --

10 THE COURT: Okay.

11 MR. CAMPBELL: -- but given that -- I just -- given
12 that I hadn't seen it, I would just like the opportunity. If
13 there's something that it prompts, I'd that opportunity, and I
14 represent to you that we won't re-plow old ground or discusses
15 Mississippi versus Michigan.

16 THE COURT: And the citation is 765 Southern Second
17 1269. And it's Mississippi in the year 2000.

18 MR. STERN: 765 Southern Second 1269, Your Honor?

19 THE COURT: Let me look again. I think so. 1269.

20 MR. STERN: Thank you.

21 THE COURT: And the quote was from 1276 to 77.

22 MR. RINGSTAD: Your Honor. On the Graziano
23 supplemental briefing, will the plaintiffs go first for the
24 9th then?

25 THE COURT: I think that makes sense.

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1 MR. RINGSTAD: Thank you, Your Honor.

2 THE COURT: Okay. Then I have one other thing that
3 came up, and I've got all the right people here, because
4 Mr. Kent is here.

5 I would like -- hold on, and I'll tell you what I'd
6 like.

7 I would like the full deposition of J. Braider. And
8 the sooner I can get that, the better. I'm looking at LAN's
9 motion for summary judgment.

10 MR. CAMPBELL: Oh.

11 MR. KENT: Oh, sure.

12 THE COURT: And so if you could file it, that will be
13 great.

14 MR. KENT: Will do.

15 THE COURT: If there's something that needs to be
16 redacted, if you can submit it to my law clerk, that's fine
17 too.

18 And then hold on one more minute.

19 Okay. I'm still following up on the number of
20 potential jurors to be summonsed, so I wanted to be sure I
21 didn't need to ask you. I'm looking for a response from our
22 jury department, but I don't have it yet. Okay.

23 Anything further from any of you?

24 MR. CAMPBELL: Thank you for your time. And from me
25 and my perspective, the last time I was live in court was, I

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1 think, March 11 with Your Honor. And so you book ended the
2 COVID.

3 THE COURT: My goodness, me, too. Happily I've been
4 in court since then. But not for a very long time, I wasn't.
5 So I was very concerned about all of us following that day.
6 So I'm glad that there were no ramifications for having
7 gathered then.

8 So I ask that you all take good care and stay
9 healthy. Good a booster shot if you haven't gotten one, and
10 I'll see you soon I'm sure.

11 MR. CAMPBELL: Thank you, Your Honor.

12 (Proceedings Concluded)

13 - - -

14
15 CERTIFICATE OF OFFICIAL COURT REPORTER

16 I, Jeseca C. Eddington, Federal Official Court
17 Reporter, do hereby certify the foregoing 116 pages are a true
18 and correct transcript of the above entitled proceedings.

19 /s/ JESECA C. EDDINGTON
20 Jeseca C. Eddington, RDR, RMR, CRR, FCRR

11/12/2021
Date